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# THE CASE FOR A CONSTITUENT ASSEMBLY FOR INDIA

A HISTORICAL AND COMPARATIVE STUDY

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## I. INTRODUCTORY

The subject of the nature of the machinery that should be devised for framing the future constitution of India has for some time been engaging the attention of the public. Even for the formation of a transitional national government to function during the period of the present War the Viceroy has laid it down as a condition that there must be 'agreement in principle between Hindus and Muslims and all important elements as to the method by which the new constitution should be framed.' The present political deadlock in the country is partly—though not wholly—due to the absence as yet of an agreement on this question. In a sense agreement on this may even be regarded as a provisional agreement on the nature of the future constitution as the latter will depend to a great extent on the kind and composition of the body that undertakes this responsible task. All these considerations go to show the supreme and urgent need for devising a method of framing the constitution which is likely to prove acceptable to all the politically minded sections of the country.

### METHODS SUGGESTED

Several methods have already been suggested for the purpose and discussions as to their relative merits and defects are being carried on. There is for instance the suggestion put forward by the Indian National Congress that the work should be done by a constituent assembly elected on the basis of adult suffrage. There is next the recommendation included in the proposals brought by Sir Stafford Cripps on behalf of the British Cabinet that the constitution should be framed by a body consisting of representatives partly elected by the lower houses of the legislatures in the Provinces of British India and partly appointed by the Indian States. A third method has been advocated by Sir Maurice Gwyer, under which the work should be



entrusted to a small and compact body of delegates chosen more or less like those that framed the Constitutions of Canada, Australia and South Africa. To him the question of size appears to be of the greatest importance. Another suggestion is a Conference of Premiers of the British Indian Provinces and the *Dewans* of the leading Indian States. There are of course several other methods that have been recommended from time to time by persons belonging to different schools of political thought. The time has therefore come to examine these various suggestions and arrive at some reasonable conclusion.

In doing this a useful purpose will be served if an understanding is obtained of the methods adopted in the other states of the modern world when they had to frame new constitutions. For, the political and the constitutional problem of India is after all not wholly unique. It bears a good deal of similarity to the problem with which many other countries were faced when they entered on the nationalistic and the democratic stage in their history. There is also nothing derogatory in borrowing institutions from abroad. Imitation has always been a powerful factor in the development of political systems as in every other field of human culture and civilization. As Professor McLeod has observed, the capacity of the human mind to create new and original political patterns is extremely limited. As a matter of fact the framers of almost all modern constitutions were influenced to a considerable degree by their study of institutions belonging to ages and states other than their own. Such a course may even be said to have become inevitable at the present day. Isolation is an impossibility. And there is much truth in the following observations of Professor Hawgood: 'Countries which scorn to borrow political ideas and devices that have already been tried elsewhere, stand in danger of institutional atrophy, just as those

which adopt them slavishly tend to suffer from institutional indigestion. The free exchange of information concerning governmental forms and experiments that the modern world provides through the printing press and its new and formidable visual and vocal allies, makes impossible the development in isolation of any governmental system, such as was general in the ancient world, not unusual in medieval times and not unknown in the early modern era.'

The importance that is attached to a proper machinery for constitution-framing arises out of the role that the founders of modern democracy assigned to the constitution in providing the right sort of government for any community. The State as it emerged in Europe in the sixteenth century was in the hands of despotic monarchs. They claimed to derive their authority from a divine and not a human source. They asserted that their responsibility was to God and not to any section of their subjects. The arbitrariness of their rule resulted in much suffering and misery for their people. The citizens were deprived of even their elementary rights to life, liberty and property. Some instrument had therefore to be devised to restrain the despotism of the rulers and to prevent them from abusing their power; and the instrument that was ultimately devised was the written or the documentary constitution.

#### NATURE OF A CONSTITUTION

A constitution may be looked at from two points of view—the formal and the functional. From the formal standpoint it consists of the body of rules according to which the government of a State is organized. In this sense every State whether it is despotic or democratic has a constitution. From the functional standpoint, however, only that State should be credited with having a constitution where the government is organized in such a way that it

is answerable to the people for what it does and where the government is made to function in such a manner that it does not encroach on the rights of the citizens but does everything to safe-guard and maintain those rights. It was in this functional sense that the term was understood by the political thinkers of the revolutionary age in the history of Europe and North America—the age which witnessed the English, the American and the French revolutions and also the age when the first experiments in deliberately framing new constitutions were made. And even at the present day this is the view that is held by a large number of writers. According to them the purpose of a constitution is to introduce 'Constitutionalism' or to make the government constitutional. As Woodrow Wilson put it: 'By a constitutional government, we of course do not mean merely a government conducted according to the provisions of a definite constitution: for every modern state with which our thoughts deal at all has a definite constitution, written or unwritten, and we should not dream of speaking of all modern governments as constitutional..... A constitutional government is one whose powers have been adapted to the interests of the people and to the maintenance of individual liberty.' In the opinion of Professor C. J. Friedrich, the presence of effective restraints on political and governmental action is the essence of Constitutionalism.

#### WHO SHOULD FRAME IT

It is because of this part the constitution has to play in the government of the modern state, that the question as to who should have the right to frame it has become one of great importance. The political thinkers of the seventeenth and the eighteenth centuries found no difficulty in answering that question. The answer came automatically to them from the political ideas dominant in those days.

It was an article of faith with them that the people were the original source of power and that the power possessed and exercised by government was one derived by it from the people. As was stated in the famous Virginia Declaration, 'all power is vested in, and consequently derived from the people: the magistrates are their trustees and servants, and at all times amenable to them.' As the purpose of the constitution is to place effective restraints on government it would not be proper to permit any branch of government like the legislature or even the whole government to frame it or alter it in any way. Any such course would make the government the master of the constitution instead of remaining its servant which is its true role. The derivative character of government and its authority can be made to stand forth adequately and comprehensively only when the constitution is framed by the people themselves or their representatives specially chosen for the purpose. The constituent power which is the power to frame the constitution is different from the legislative power. The former must be lodged with the people and nowhere else.

The propriety as well as the need for keeping the constituent power with the people themselves have been set forth by Hamilton, one of the fathers of the American Constitution, in one of the essays he contributed to *The Federalist*. The concluding portion of the essay brings out the force of his contention in the following words: 'It has not a little contributed to the infirmities of the existing federal system (he refers to the Confederacy of the United States as it existed between 1776 and 1789), that it never had a ratification by the people. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the erroneous doctrine of a right of legislative repeal.

Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.' It was on the basis of this contention that the Federal Constitution of the United States framed by the Convention in 1787 was submitted to ratification by the people.

Although democratic doctrine has undergone a great deal of modification since the revolutionary age, the view that the people are the ultimate source of power and that governments should derive their authority from a constitution made or approved by the people has continued to hold its sway down to the present day. It is in consequence of this theory that in almost all states which have a democratic as distinguished from a despotic form of government, constitutions have been framed by constituent assemblies or conventions representative of the people and chosen directly or indirectly by them and chosen also in many cases for the sole purpose of framing the constitution so that there might be no mixing up of constituent and legislative powers. We can therefore lay it down as a generally accepted proposition that democratic constitutions should be framed only by such assemblies or conventions. To what extent this theory has been adhered to and under what circumstances it has been departed from in the framing of the constitutions of modern times will be shown in the next chapter.

## 2. HISTORY OF MODERN CONSTITUTION-MAKING

### THREE CATEGORIES

The states in which new constitutions were deliberately framed in modern times fall roughly into three categories. In the first category are States like the thirteen British Colonies of North America, Ireland, Czechoslovakia, Yugoslavia, Finland, Poland, Estonia, Latvia, Lithuania, etc. which secured national freedom after overthrowing a previously existing imperial yoke. In the second category are States like France, Germany and Austria which had to face not a problem of national liberation but of the establishment of a democratic form of government in place of a despotic one. In the third category are States like the United States of America, Switzerland, Canada, Australia and South Africa which were formed out of the coming together of political units which were previously independent of one another. It should be noted that states included in the first two categories had to pass through a stage of violent revolution at the time of framing their constitutions while those included in the third category had no such situation to confront them but were able to accomplish their task through peaceful negotiation. This difference in the circumstances under which they had to frame their constitutions accounts to some extent for the difficulties experienced by the constitution-framers of the first two categories of States in strictly adhering to the theory of Constituent Assembly referred to in the previous chapter.

### ENGLAND

The first experiments in deliberately framing a new constitution by the adherents of the theory of Constituent Assembly were made in England after the great Civil War in

consequence of which King Charles I was executed and royal despotism was overthrown. Political power then passed not into the hands of Parliament but of the Army. The Army contained a large number of persons who accepted the principle that 'the source of all government is the people; that the people by their agreement together create the government; that they have the right not merely to clothe the government with powers but also to fix limitations upon its action which it must not exceed.' On the basis of these principles a section of the Army prepared a written Constitution entitled 'The Agreement of the People' and presented it to the House of Commons. But it was not at all put into operation. The initial stages of a revolution require a strong dictatorship and such a time is not propitious for new political experiments. All the same, a little later the leaders of the Army prepared another written constitution called the 'Instrument of Government' which was put into effect by Cromwell the virtual dictator of the country without referring it to the Parliament or the people for sanction. Even this did not take any root in the land. When in 1660 the monarchy was restored the method of deliberate constitution-making was once for all abandoned in England and the subsequent establishment of democracy in that country was brought about by the traditional method of slow and gradual change through parliamentary legislation.

#### THE U. S. A.

It is therefore to the United States that one has to go for the earliest examples of constitution-making which produced permanent results. In 1774-5 the thirteen English Colonies in North America overthrew the yoke of the mother country. They ceased to be colonies and became sovereign States. They then found it necessary to have

constitutions in consonance with their new status. Though the revolutionary leaders in them were believers in the theories of Constituent Assembly they did not find it possible to adhere strictly to them. The times were critical and the war of independence had to be carried on. What happened under these circumstances was the setting up in almost all these states of emergency or provisional governments. They were generally known as congresses or conventions. They were more or less self-appointed. Though representative of the people in a way they were not formally elected by the people. It was these bodies that undertook the work of framing constitutions for their states in the intervals between their ordinary duties of legislation and administration. They exercised both the Constituent and the legislative powers. The Constitutions of Virginia, South Carolina and New Jersey were framed by such bodies. In the case of seven of the other states the provisional conventions received an express authorization from the people to frame constitutions also, although they were not chosen solely for that purpose. But none of these constitutions was submitted to the voters for approval.

Though the crisis through which the States were passing was in the main responsible for this departure from the theory of Constituent Assembly, many took objection to it. So strong was the objection taken to such a course by the people of Massachusetts that it became absolutely necessary to adhere in all detail to the prevalent theory before the constitution of that State could be framed and put into effect. A special convention consisting of members elected by all adult freemen was called. It drafted a constitution and submitted it to the town-meetings for debate, revision, approval, or rejection. It met again, considered the objections raised, revised the constitution in their light, and put it into effect. From 1780 onwards it was on the



basis of this constitution that the Government of the State was carried on. Massachusetts thus set the pattern for later State constitution-making in the United States. 'The process was perfect; no one could doubt that the people were the source of governmental authority, that their will was superior to the government which was their creature, or that the government and the State were not the same.' All this secured to the constitution its status as a higher law, standing above the ordinary legislature and the laws enacted by it.

In the framing of the Federal Constitution of the United States the theory of Constituent Assembly exercised considerable influence. 'A special convention solely for this purpose was convened in 1787. All the States except Rhode Island sent delegates to it. The delegates—seventy-four in number—were not elected directly by the voters. It was the legislatures of the States that chose them and gave them instructions as to what they should do. Nineteen of the delegates did not attend the convention. Of those that attended thirty-nine signed the final draft of the Constitution. The draft was then transmitted to each of the States for being ratified by the people. In each State a convention specially elected for the purpose met for considering the draft and before the close of the year 1788 eleven of the States ratified it. Rhode Island which kept aloof from the constitution-framing convention also ratified it in 1790 and joined the Federation. It was in May 1787 that the convention met and it was on April 30, 1789 that the Constitution was inaugurated when Washington the first President took the oath of his office.

#### FRANCE

The constitutions framed in France during the revolutionary era (1789-1799) were also the work of assemblies elected directly or indirectly by the people. The Con-

stitution of 1791, for instance, was framed by the National Constituent Assembly. It contained 1200 members and half of them were the representatives of the third estate chosen indirectly by all Frenchmen of the age of twenty five and above, whose names were on the tax-rolls. It has been calculated that those who were excluded from voting owing to their being too poor to pay even the smallest taxes came to about an eighth part of the total population. Those who secured the right to vote numbered five million out of a possible six million adult men. Under the Constitution framed by this Assembly the despotic monarchy was transformed into a limited or constitutional monarchy. But this Constitution was short-lived. Owing to a variety of circumstances, republican sentiment grew among the revolutionaries and it became necessary to draft a new constitution to establish a republican regime. This work was taken up by the National Convention which was indirectly elected by universal manhood suffrage although in the actual elections indifference or intimidation reduced the voters to about a tenth of the total electorate. But as one historian observes there is no good reason to doubt that they represented the will of the electorate as a whole. Two constitutions were framed by this body—one in 1793 and the other in 1795. Both of them were submitted to the people who ratified them by overwhelming majorities. But owing to the great crisis in which the country was involved—due in the main to the intervention of foreign states in French domestic politics—and the wars which followed it, the Constitution of 1793 was kept under suspension and a provisional government more or less dictatorial in character was organized by the Convention to function during the first phase of the crisis. The second Constitution—that of 1795—which provided for what is called a Directory lasted till 1799 when it was overthrown by Napoleon. With

the rise of this great general to power democracy completely disappeared. The governmental system of Napoleon was as despotic as that of the Bourbons. But so great was the hold that the doctrine of popular sovereignty obtained over the country that even he found it useful to have the assumption of imperial power by him ratified by the people through a plebiscite. The revolution through which France passed in 1830 resulted in a mere change of monarchs; and the question of framing an entirely new constitution did not then arise. The revolution of 1848 was, however, of a quite different character. There was a party of republicans among the revolutionaries and they wanted a republican government established in the country. The provisional government which was formed in the early stages of the revolution established universal suffrage and on that basis a constituent assembly was elected. It consisted of nine hundred members. It suppressed the extremists among the revolutionaries—the extremists who tried to have some kind of communism—and then framed a republican constitution. This was in operation for three years when it was overthrown by Napoleon III to whom the people granted through a plebiscite the power to remodel the system of government. A year later the people gave through another plebiscite their approval to Napoleon being proclaimed Emperor. The year 1871 saw another revolution in France. It was precipitated by the complete defeat of Napoleon III in the Franco-German war. The Provisional Government of National Defence which established itself in power in the later stages of the war called a National Assembly of 750 members elected by universal suffrage. It was this Assembly that framed the Constitution of the Third Republic, the constitution under which France was governed until the military occupation of the country by Hitler in 1940. It is the longest-lived of all post-revolutionary constitutions.

It should be noted that all the republican constitutions of France from 1791 onward were framed by constituent assemblies elected practically by universal suffrage. All the assemblies were big in size. They did not contain only theorists or doctrinaires: among the members there were many shrewd and practical-minded statesmen. Universal suffrage did not result in the assemblies being dominated by mere demagogues or visionaries. Some of the republican constitutions were still-born: some functioned for only a short period; and one at least—the Constitution of 1875—worked for about seventy years. The only generalization that can be drawn from French experience is that the life of a constitution or its workability does not depend solely on the structure and composition of the Constituent Assembly. There are several other factors that influence the course of events. And among these factors are not only the nature of the internal situation but also of the situation outside the state. When society is itself in a flux and the point of equilibrium is not reached, any constitution that may be framed—whoever its makers happen to be—is bound to be unstable.

#### GERMANY

During the modern age new constitutions were framed for Germany on two occasions—in 1848 and in 1919. In both cases it was in the midst of a revolution that the work was undertaken. In 1848 there was a general revolutionary movement over the whole of Europe. In Germany it was both a nationalistic movement and a democratic movement. The revolutionary leaders wanted to unify all Germany under one central government and at the same time to give some democratic character to the government to be established. They had to fight with and overcome the opposition of the rulers of numerous states, small and big, in the country.

the rulers who were not prepared to give up their autocracy. The movement got some success in the initial stages. Before events moved further some of the rulers including the King of Prussia granted certain concessions to their subjects embodied in what are technically known as octroyed constitutions. But this did not satisfy the insurrectionaries. They therefore called a Constituent Assembly of nearly six hundred members elected practically by universal suffrage and entrusted to this body the work of framing a constitution based upon the liberal political philosophy of the day. The Assembly met at Frankfurt and after long deliberations extending over a year and more produced a constitution for a united Germany. Of the work of this Assembly a writer observes: 'It however succeeded in drafting a constitution of many high merits, a constitution nobly planned, which guaranteed civil liberty to every German, equality before the law, responsible parliamentary control for the central government and for the governments of the separate states.' But by the time the Assembly completed its work the revolutionary movement was suppressed and the autocratic rulers triumphed everywhere. The constitution could not be put into effect. It became a still-born child—indicating thereby that only that constitution can work which is framed by those who have conquered power in the first place and who can provide a sanction for it. Those who claim the right to frame a constitution must also have the necessary power to make it, and enforce it when it is made.

The second occasion on which a constitution was framed for Germany was in 1919 after the last World War. With the abdication of the Kaiser there arose in the country a struggle for power among the various revolutionary parties. The provisional government which consisted of moderate socialists put down the insurrection of the extremists and

established itself firmly in authority. Having thus conquered power it called a Constituent Assembly elected by universal suffrage on a system of proportional representation and entrusted it with the work of framing the constitution for a republican Germany. The Assembly had 421 members. It met at Weimar and its deliberations resulted in the Constitution of the German ( Weimar ) Republic on the basis of which the government of Germany was carried on until 1933 when the Nazi Dictatorship under Hitler was established. Though the constitution was in operation for only a short period it has been considered by competent observers as a remarkable document giving the best expression to the ideal of social democracy. Part II of the constitution which is devoted to an enumeration of the rights and duties of German citizens is the most notable part of it. The following observations made in respect of this part by two careful and sober students of the subject are noteworthy :

‘ All this part is worth detailed and careful study as a fine expression of national will to attain a new and better social state.....It may be an essay in political philosophy ; it is also a basis for political practice, and it finally disposes of the idea of the non-political German. There is nothing about it of the native idealism of which Germany has been and still is so prolific ; it is emphatically the work of practical politicians who were no Utopians but were wise enough to reject the extremes of anti-Utopianism and to recognize the necessity of an idealist basis for development.....It is the work of men whose ideal of the State and of the citizen is service, and who honestly sought to build a new Germany.....Power has passed from the men who framed it and the enemies of the ideal it embodied have so far prevailed, but it remains as a monument in German history and the basis on which the Germany of the future must be built if it is to continue true to the ideal laid down

at Weimar.' One conclusion that may be drawn from observations like these is that it is not difficult for a constituent assembly elected as the German assembly was elected by universal suffrage to frame the right kind of democratic constitution. The collapse of democracy in Germany is not as some critics think due to the imperfections in the constitution or in the organization and structure of the assembly that framed it. It is factors like the unsatisfactory settlement arrived at in the peace conference of 1919, the general economic depression throughout the world, the race in armaments between the Haves and the Have-nots, etc. that have been responsible for the growth of dictatorships in most parts of the world.



#### SWITZERLAND

Switzerland is another example of a State which had to pass through a civil war and revolution before she could frame a constitution suited to the requirements of the modern age. Until this constitution was framed in 1848 Switzerland was not a single state at all. She was a loose confederation of sovereign Cantons, and common affairs were settled through a Diet composed of envoys from the Cantons voting according to the instructions issued by their governments. On many questions unanimity of voting was also required. Moreover there was no central executive to give effect to the decisions of the Diet. It was also permissible for individual Cantons to have dealings with foreign states and to organize themselves into smaller leagues within the larger confederacy. All this resulted in the utter weakness of the country and her being exposed to foreign attacks and intrigues. A party of federalists arose by 1847 whose aim was to establish a genuine central government with effective legislative and executive powers in certain essential matters of common interest. They were opposed by the conserva-

tives ; and it so happened that some of the Catholic Cantons were among the opponents. These organized themselves into a separate league -- the *Sonderbund* -- and were prepared to call in the help of powerful foreign States like Austria, Prussia and France, and to completely secede from the Confederacy. The Confederate Diet and the Protestant Cantons declared war against the *Sonderbund* and crushed it completely (1848) before any foreign intervention became possible. This victory enabled the federalists to seize power and reform the constitution in accordance with their views.

The Diet of the Confederacy appointed first a Committee of Revision. The Committee drafted a constitution modelled to some extent on that of the United States. The draft was then sent by the Diet to the Cantons to obtain their advice and instructions for final discussion and decision. A large number of amendments were suggested by the Cantons, but the majority of the Cantonal envoys to the Diet were empowered to vote for the best attainable federal scheme. The Diet adopted the draft constitution with a few minor amendments and submitted the revised draft to the Cantons for their definitive acceptance or rejection. 15½ Cantons with a population of 1,900,000 approved the draft while 6½ Cantons with a population of 290,000 voted against it. The Diet thereupon declared the new constitution to be in force and it came into operation in 1848. It is according to this constitution revised in 1874 that Switzerland is being governed today. The Swiss Constitution may therefore be said to have been framed by a Diet representative of the people and ratified by them.

#### SOME OF THE OTHER STATES

It is not proposed to refer here in detail to the machinery devised in the other States of the modern world for framing constitutions of a democratic character. It is



well known that the era of the last World War witnessed an almost universal adberence to the principle and practice of political democracy. In almost all States that arose out of the disintegration of the empires of Austria, Germany and Russia the calling of a constituent assembly became a fundamental constitutional precept. 'No sooner was revolution over than schemes were pushed forward for a consultation of the people in the fullest possible manner, to determine by their mandate the future form of organization of the State.' Each State of course had its own special problems and difficulties; but it was in and through the constituent assembly that attempts were made to solve them. In Austria the assembly was elected by universal suffrage. It consisted of 170 members. For a time its action was delayed owing to the rise of a party of extreme federalists who brought into existence another organization of representatives chosen not by the people as a whole but by the various provincial assemblies. Ultimately however an understanding was arrived at between the two bodies and the Constituent Assembly framed a federal constitution for the new Austrian republic. In Jugoslavia, Lithuania, Poland, Finland, Esthonia and Latvia it was constituent assemblies elected by universal suffrage that framed the constitutions. In some of them the proportional system of representation was made use of, while in others that was not the case. It may be noted that constitutions framed by these bodies were not submitted to the people for ratification.

#### CZECHO-SLOVAKIA

In Czecho-Slovakia there was a departure from the system of constituent assembly of the type referred to above. In this State which had to face several problems due partly to the existence of national minorities like the Südeten Germans and Ruthenians and partly to the long

delay made by the Peace Conference in finally settling its boundaries, the constitution was framed not by a democratically elected assembly specially chosen for the purpose but by a *national* assembly created by a distinctive process. This assembly was made up of those representatives that were elected to the *Reichsrat* of the Austrian empire (of which Czecho-Slovakia was then a province) in 1911 from the Bohemian, Moravian and Silesian crown lands. When a little later the Slovaks also formally adhered to this State the assembly co-opted fifty-five of them and when the final boundaries of the State were settled by the treaty with Hungary, additional representatives were allotted to Slovakia—all through the system of co-option. The total strength of the Assembly thus formed was 256. Professor M. W. Gráham speaks eloquently and admiringly of this body. He says: 'All formal aspects aside, however, the assembly which adopted both the provisional and definitive constitutions for the Czechoslovak State was decidedly national, that is, fully representative of the political currents at work in the pre-war life of the nation, and utterly unobstructed by the presence, in its midst, of divergent and discordant national minorities. It was not intended to leave the adoption of a permanent form for national evolution to the caprices and whims of fortuitous political majorities such as were found in the contemporary Polish Sejm, but it cannot be charged that the Czechoslovak National Assembly refused to accord minority guarantees to the non-Czech and non-Slovak populations. In fact it is on record in the deliberations of the Paris Peace Conference's Committee on New States that the Czechoslovak Government's proposals regarding minority guarantees went farther than anything which the committee would have felt justified in putting forward.'

## IRELAND

Among the States that had first to seize power through a revolution before getting the opportunity to frame a constitution was the Irish Free State. Students of history are familiar with the long struggle of Ireland for national independence. All attempts made by the British to solve the Irish problem ended in complete failure simply because while the Irish took their stand on the principle of national self-determination and complete sovereignty, the British could not go beyond devolution and some kind of Home Rule. The Irish position was clearly stated in the following words by the nationalists in 1918: 'Ireland is a nation and it is upon a like foundation that we believe the Irish Constitution should now be built. There is room for compromise on details and even on secondary questions of principle, and there is abundant room for compromise of the wisest kind in the form of safe-guards for the minorities inside Ireland, without limiting the powers of Ireland as a whole.' Not only was this claim to nationhood not conceded by the British but they also took advantage of the religious differences between the Protestants of Ulster and the Catholics in the rest of the country, accentuated the existing divisions, made even a federal solution impossible and encouraged the Ulsterites to agitate for the partition of the country.

When the Home Rule Bill providing for one parliament for the whole of Ireland was passed in the House of Commons in 1912 and threatened to become law in spite of the opposition of the House of Lords, the Ulsterites raised a volunteer army and organized armed resistance. This only exasperated the nationalists who now found an organized party in Sinn Fein. Taking advantage of the situation created by the First World War the Sinn Fein undertook an armed insurrection during the Easter of 1916, proclaimed

the Irish Republic and established a Provisional Government. The English succeeded in putting down the rebellion but the cruel manner in which it was done created an irreparable breach between the two countries. At the general elections held for the British Parliament in 1919 it was on the issue of independence that the election was fought in Ireland. The Sinn Fein party captured almost all the seats outside the north-eastern counties of Ulster. The seventy-three members thus elected were however under a pledge not to take their seats in the British House of Commons. They therefore assembled in Dublin in a Parliament of their own—known as Dail Eireann—issued a Declaration of Independence, set up a ministry and began to run a parallel administration alongside of the British. In 1920 the British Government passed a Government of Ireland Act which made the partition of the country an accomplished fact, set up two parliaments with limited powers—one for Ulster and the other for the rest of Ireland; and provided for a federal council of forty members, twenty elected by each of the two parliaments, exercising only such powers in relation to all-Irish matters as the parliaments might agree to bestow upon it. Certain important matters like national defence and foreign relations were reserved for the exclusive jurisdiction of the British government.

All this made the nationalists in Ireland more irreconcilable than ever. Their resistance to British authority became more acute and pronounced. The coercive measures adopted by the British did not succeed. Guerilla warfare became the order of the day. By 1921, however, both Britain and Ireland became convinced that as the military situation was not decisively in favour of either party the issue should be settled by some amicable means. Negotiations were opened by the British Government. A peace conference was assembled and as a result of its deliberations

a treaty was concluded between the two countries. The treaty recognized the right of the Irish outside Ulster to national sovereignty subject to their allegiance to the British Crown and to a few other conditions relating mostly to defence : and the long political struggle between the British and the Irish came to an end in a way.

It was then ( 1922 ) that the Irish had to undertake the framing of a constitution for their country. In doing this they adhered to the theory of Constituent Assembly which by that time had become an integral part of democratic doctrine. A constituent assembly elected on the basis of the suffrage—which was practically universal—provided for in the Government of Ireland Act of 1920 was called. It contained about 130 members. The republican deputies, however, who were opposed to some of the terms of the treaty with England and who were led by De Valera refused to take part in its deliberations. The debate on the draft constitution commenced on 18th September 1922 and ended on 25th October. The constitution it framed came into effect on 6th December.

There are two points that require to be noted about this Constitution. The assembly which framed it remained a pure constituent assembly. It did not perform a single act of ordinary legislation. During the period of its sittings all measures of a legislative character which were urgent and of immediate importance were enacted as decrees or orders of the provisional government. It thus maintained the rigid separation between the constituent and the legislative powers. The other point that is noteworthy is that while the constitutions of all the other Dominions within the British Commonwealth of Nations are in the form of enactments by the British Parliament, the Constitution of the Irish Free State owes its existence entirely to the Irish people themselves. This feature is prominently brought out

in Article 2 of the Constitution which runs as follows : 'All powers of Government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State ( Saorstát Éireann ) through the organizations established by or under, and in accord with, this Constitution.'

#### THE THIRD CATEGORY

As distinguished from the States which before framing their constitutions had to pass through a stage of violent revolution, are those where the task was accomplished through peaceful negotiation among the parties concerned. Even in these cases power had to be seized by those who wanted to change the older political and constitutional system and introduce a new one in its place. But this could be done and was done through agreement and compromise instead of through war. The most important of these states are the United States of America, the Dominion of Canada, the Australian Commonwealth and the Union of South Africa. What happened in the case of the United States of America in 1787 was the transformation of a Confederacy into a Federation, and this was achieved without any war between the advocates of Confederation and of Federation. It was in a similarly peaceful manner that the Dominion of Canada became a Federation in 1867, the Australian Commonwealth in 1900 and the Union of South Africa was formed in 1909. These were the fruits of negotiations among self-governing colonies over which Britain had ceased to exercise much power.

#### CANADA

In form it was by an Act of the British Parliament—the British North-America Act—that Canada became a Federation. Technically therefore it is the British Parlia-

ment that framed the Constitution of Canada. But as a matter of fact the Act passed by the British Parliament was based entirely on the resolutions that were agreed to by the delegates appointed by the Governments of Canada, Nova Scotia, New Brunswick and Prince Edward Island and assembled in a conference at Quebec in 1864. The assembly therefore that really framed the Constitution of the Dominion of Canada was this conference. Of course it was unlike any of the constituent assemblies referred to in the earlier part of this chapter. Its members were not elected by the people at large specially for the purpose of constitution-making. They were only the nominees of the different provincial ministries in British North America of the day. There are, however, two points that require to be noticed in this connexion. One is that all these provinces enjoyed responsible government by 1864. Each of them had a legislature elected by the people and a ministry responsible to the legislature. This meant a sort of identity between the public opinion prevailing among the people, the opinion prevailing in the legislature and the policy of the ministry. Any action therefore that was taken by the cabinet might be generally regarded as action resting on popular consent. The other point to be noted is that it was agreed at the Quebec Conference that the seventy-two resolutions that were passed by the delegates should be submitted to the provincial legislatures for rejection or acceptance as a whole so that they might be regarded as having a wider sanction behind them than that of the provincial cabinets. This procedure was adhered to and it may therefore be said that the constitution that was framed for the Dominion had the consent of the people behind it although the channel through which the consent was expressed differed from that which was advocated by the strict adherents of the theory of Constituent Assembly.

The subsequent history of these resolutions reveals certain features which are of interest in a study of constitution-making. The resolutions were discussed in the Canadian Parliament and came in for searching criticism. As is observed by a learned student of Canadian Constitution: 'the most serious point of attack lay in the challenge that a virtual treaty had been made by those to whom no such commission had been entrusted and that the terms of the federation had not been submitted to the people.....The cabinet defended itself by stating that the matter had been under discussion at least since 1858, and that many by-elections in 1864 had returned candidates in favour of the scheme. that no public meetings were widely organized against it and no adverse petitions were presented, that the Government felt justified in assuming that the resolutions in principle met with the approbation of the country, and that it would be obviously absurd to submit the complicated details of such a measure to the people.' The resolutions were of course passed in the parliament by large majorities. All the same the criticism is not without point. Even under a system of responsible government it is better when fundamental constitutional changes are made that a specific mandate from the people be obtained, keeping in mind the distinction between matters of 'principle' and matters of 'detail' that was drawn by the government spokesmen.

In New Brunswick the cabinet did not submit the resolutions to the legislature and get them thoroughly examined and discussed there. It dissolved the legislature and made the resolutions the issue at a general election. Only six supporters of federation were returned from forty-one constituencies and the idea of federation had to be dropped for the time being. The course of events in New Brunswick produced a disastrous effect in Nova Scotia as well as in Prince Edward Island. In the former the legislature passed



a resolution in favour of an earlier plan for a legislative union of only the three Maritime Provinces while in the latter the legislature rejected all schemes of federation.

But opinion gradually changed in the Maritime Provinces also, partly due to the tactful influence exercised by the English Colonial Office over them. At the elections held in 1866 in New Brunswick the cause of federation swept the province and in Nova Scotia also the legislature adopted a motion in favour of federation. It was then that delegates appointed by the cabinets of Canada, Nova Scotia and New Brunswick went to London, assembled in a conference, passed sixty-nine resolutions similar to those passed at the Quebec Conference and forwarded them to the Colonial Secretary. A draft bill based on these resolutions was finally prepared in a conference of these delegates and of some representatives of the British Government. The British Parliament passed it into an Act without any modifications. It is this Act—the British North America Act—that forms the Constitution of the Dominion of Canada today. It is the work of a conference of a small number of delegates appointed by the cabinets of the provinces that were anxious to have a federation.

#### AUSTRALIA

The history of constitution-making in Australia illustrates the absolute need of having the constitution of a democratic State framed by a body fully commanding the confidence of the people, expressed in clear and unambiguous language. It was Sir Henry Parkes, the premier of New South Wales who first took up the question of federation in a serious spirit. In one of the earliest speeches he delivered on the subject (24th October 1889.) he emphasized the importance of the constitution emanating from a source broader than the governments of the colonies. He said: ‘They

(the Governments) must appoint a convention of leading men from all the colonies—delegates appointed by the authority of parliaments of the colonies.' Before such a convention was constituted an informal meeting of the colonies for purposes of preliminary consultation was held on 6th February 1890. The government of each colony appointed two delegates representing the party in power as well as the party in opposition and with the addition of one delegate from distant New Zealand the informal conference of thirteen members agreed on the desirability of a federation and invited the legislatures to appoint delegates to a National Australian Convention empowered to consider and report on an adequate federal scheme. The legislatures thereupon elected the delegates. Seven came from each of the six colonies in Australia and three from New Zealand. Here also care was taken to represent both sides of the legislatures and both the houses in them. The convention met at Sydney in March 1891 and after a series of deliberations drafted a bill to constitute the Commonwealth of Australia. The convention recommended that each colony should be left to itself to decide the manner in which the draft bill should be ratified: and it also resolved that each colony should accept or reject the bill as a whole so that there might be no need for the convention to meet a second time to consider any amendments.

The bill, however, did not on the whole meet with a favourable reception outside the convention. As Quick and Garran observe in their exhaustive study of the subject: 'It soon became clear that neither the Parliaments nor the people would accept the work of the convention as final. The Parliaments naturally enough, resented the idea that a constitutional change of such vast importance should be effected without their having any voice in the details of the scheme. And in the minds of many of the people

there was a vague feeling of distrust in the constitution, as the work of a body somewhat conservative in composition, only indirectly representative of the people, and entrusted with no very definite or detailed mandate even by the Parliaments which created it. The consequence was that while the Bill received unstinted praise in some quarters, it was subjected to unsparing criticism in others.' These observations are of great significance. They show clearly how in a democratic environment it is necessary to consult all the organs through which public opinion is expressed if any great constitutional change—however excellent intrinsically it happens to be—is to be effected. It is this lack of a popular backing that was responsible for the bill prepared by the convention of 1890 not having been put into effect. It had many merits and as a matter of fact it formed the basis for the later bill and therefore for the final Constitution of the Australian Commonwealth. But it could not produce any immediate results.

In the subsequent history of the federal movement this point was clearly grasped. The Australian Natives' Association which now took up the agitation in favour of federation and which carried on a large amount of propaganda for the purpose, strongly advocated that the convention which might be called upon to frame the federal constitution should consist of members chosen by the people and not by the legislatures and that the constitution so framed should be subject to ratification by the people through a referendum. On this point Quick and Garran observe: 'The adherents of the parliamentary system had thought that the people would be less likely than the parliaments to select men who by ability and training were most suited for the work of constitution-making; but they had forgotten that more important even than the personnel of the convention was the public confidence in the convention. The

result showed that the chosen representatives of the people were for the most part those who would have been the chosen representatives of the parliaments; but from the fact of their election by the people they had a power, and they enjoyed a confidence, which election by the Parliaments could never have given them.' What is required in framing a constitution is not merely knowledge and expert ability—they have of course their importance—but also the power to put into effective action the knowledge and ability possessed. And in a democracy this can be secured only through the people.

In January 1895 a conference of the premiers of the colonies in Australia was held and it approved the procedure recommended by the Australian Natives' Association. In four of the colonies—New South Wales, Victoria, South Australia and Tasmania—the people elected ten delegates each to the convention. In Western Australia, however, they were elected by the parliament. Queensland kept aloof from the federal movement. The convention consisting of these fifty delegates sat for about a month at Adelaide and drafted a bill. The bill was considered by the several parliaments and many amendments were suggested. The convention met for the second time at Melbourne and re-drafted the bill in the light of these amendments. The draft constitution was then submitted to a popular referendum in four of the colonies—Western Australia having preferred ratification by the legislature itself. There was a majority for the constitution in all of them but it so happened that in New South Wales—the premier colony—the majority was slender and less than what was laid down in the earlier Enabling Act. To consider the objections raised by the critics in New South Wales another premiers' conference was held in January 1899 and an encouraging feature of it was that Queensland which till then had kept

away from the federal movement also joined the conference. The bill was redrafted and was again submitted to a referendum in the colonies. This time the electorate accepted the draft. It was then taken to England where without any modification the Parliament passed it into an Act—the Commonwealth of Australia Constitution Act of 1900. It may thus be concluded that the Constitution of Australia was framed by a constituent assembly consisting of delegates directly elected by the people in four of the colonies and by the parliaments in the remaining two, and that in shaping it at successive stages the conferences of premiers, leading members of the legislatures belonging to both sides and both houses and the legislatures themselves played an important part.

#### SOUTH AFRICA

The Constitution of South Africa was framed by a National Convention of thirty delegates elected by the legislatures of the four self-governing colonies of Cape Colony, Transval, Orange Free State and Natal. Twelve of the delegates represented Cape Colony, eight Transval, and five each Orange Free State and Natal. To these were added three from Rhodesia as it was then thought that she also might be admitted into the proposed Union.

The Convention met on October 12, 1908, sat for one session in Durban until November 5; met again at another session in Cape Town on November 23, and sat until February 3, 1909. It drafted a constitution for the union of the four self-governing colonies on a unitary instead of a federal basis. The draft was then submitted to the four colonial parliaments and a number of amendments were suggested by them. These were considered by the Convention at its third session at Bloemfontein from May 3 to 11, 1909 and the draft act was revised. In three colonies the revised

draft was ratified by the votes of the legislatures while in Natal it was through a referendum that ratification was secured. The draft was then sent to England to have it enacted into an Act by the Imperial Parliament. At the same time each of the four colonial legislatures elected some delegates to proceed to London and agree there in consultation with the Colonial Office to any amendments not inconsistent with the provisions and principles of the draft act. Certain amendments were agreed to by these delegates and the Imperial Parliament passed the amended draft into a regular Act—The South Africa Act, 1909. The Union of South Africa was proclaimed on May 31, 1910.

The constitutions of Canada, Australia and South Africa were framed by bodies of small size. This is not surprising in view of the very small numbers of population that inhabited these countries at the time when their constitutions were framed. The Quebec Conference which drafted the Canadian Constitution was the smallest constituent assembly that ever sat. The South African Convention with its thirty-three delegates comes next. Even the Australian Convention which was the biggest of these three constitution-making bodies was only fifty in strength. But the methods adopted to select the delegates to these bodies were not the same. In Canada it was done by the cabinets; in South Africa by the legislatures, and in Australia by the people themselves in four of the colonies and by the legislatures in the remaining two. The draft constitutions were ratified by the legislatures in Canada and South Africa and partly through legislatures and partly through popular referenda in Australia. In no case was the work of constitution-framing entrusted to mere experts not chosen directly or indirectly by the people although the help and advice of experts were taken. The democratic theory of the revolutionary age in regard to constituent assemblies exercised

its influence in the framing of the constitutions of these three dominions.

### 3. THE TEACHINGS OF HISTORY

From a survey of the history of constitution-making in modern times it is possible to draw a few generalizations.

#### TRANSFER OF POWER

The framing of a constitution comes only after the seizure of power by a new group of people within the state. Such a seizure of power is a necessary preliminary to the making of a constitution. It is because a new constituent power emerges within the State that the need for a new constitution arises. All revolutions—peaceful or violent—are characterized by a transfer of power from one set of people to another. This settles what may be called the political problem within the community—the problem as to where power should be located. Until this is done all attempts at constitution-making and all discussions about the ideal machinery for the purpose are bound to be futile and academic. The constitution is merely the arrangement through which the group that has seized power gives stability and permanence to the principles and modes of government and administration for which it stands. And it is in this sense that the constitution becomes the fundamental law of the new State.

#### THE NEED FOR POWER

It thus becomes a truism to say that a constitution is as a matter of fact made by those who have the power to make it and this power to make a constitution

does not consist merely in the knowledge and ability required to draft a sound document—however essential these may happen to be—but in the strength to enforce and work the constitution when once it is made. Like every other law the constitution must have a sanction behind it. This is the truth contained in that famous saying of the great philosopher Spinoza that power and right should always go together and that very little is gained by putting forward claims to rights when there is not the strength needed to make them effective. It is only those who can digest and assimilate food that have a right for it. History bears out the truth of Spinoza's observation. It is because in most of the revolutions of the modern age, groups believing in a democratic form of government were able to seize power that it was possible to frame constitutions of a democratic and responsible type in very many countries of the world and put them into effective operation. The liberal constitution framed in 1848 for Germany by the Frankfurt assembly failed not because the constitution itself was imperfect but because by the time the assembly completed its task the counter-revolutionary forces gained ground and the whole democratic movement was suppressed. It may be incidentally noted that the power which provides sanction for a constitution is not only the command over the necessary military and police forces—these must always exist behind law—but also the moral strength based on public opinion and popular support. It is for instance the claim of many British statesmen and authors that on no Act of British Parliament were so much time, energy and intellectual ability brought to bear as on the Government of India Act of 1935. But this Act could not be completely put into force not because the British authorities had no military strength behind them but because they lacked the necessary popular support.



### PROVISIONAL GOVERNMENTS

History also shows that every successful attempt at the seizure of power brings into existence an extra-legal provisional government and it is such a government that arranges for the framing of a new constitution. It is these provisional governments that determine ultimately how the constitution should be made, what machinery should be set up for the purpose and how it should be constituted and made to work. It was for instance the Continental Congress—an extra-legal body—which acquired sufficient power over the thirteen Commonwealths during the War of American Independence that drew up the Articles of Confederation and summoned the Federal Convention of 1787 to frame the Federal Constitution of the United States. It was similar provisional governments in each one of the thirteen colonies that either framed their constitutions or convened special constitutional conventions for the purpose. The role of Provisional Governments in this sphere may be illustrated from the history of every other country where constitutions had to be made afresh after a period of revolution.

### NATURE AND FUNCTIONS OF A CONSTITUTION-MAKING BODY

But when once a constitution-making body is convened it becomes the master of itself. It functions as a sovereign assembly determining its own procedure. It often does this in consultation with or with the co-operation of the Provisional Government but there is no diminution whatever in its sovereign character. Unless it is free to do its work in its own way it will not be in a position to produce a real constitution. It must carry on its task with the utmost freedom of speech and discussion. Its conclusions should be arrived at after mature deliberation over all the issues involved. An assembly which functions in accordance with

the dictates of an outside authority can never produce a constitution in the sense of a body of fundamental principles imposing effective restraints on government. A plebiscite through which formal popular approval is obtained for a constitution actually made by an autocrat or dictator is no substitute for real discussion in a sovereign constituent assembly. As Professor C. J. Friedrich observes: 'This point of free speech and assembly is essential in appraising the plebiscites of contemporary dictatorships. Hitler's plebiscite on his assumption of the presidential powers is as hollow a gesture as Napoleon's. Wholly different were the circumstances of the adoption of the Constitution of the United States. Here wide popular discussion, even heated controversy, preceded a vote on the constitution, nor did an alternative government, the confederation, cease to exist until the majority of the people had consented to the change. Likewise the Constitution of Switzerland of 1848 owes its existence to a true working of the constituent power. The parallel is interesting in that both these constitutions led to a federal government superseding a federation of governments.'

It is only in a limited sense that a constituent assembly directly frames a constitution. The making of a constitution is in actual fact the work of many persons and bodies and some of them may even be outside the assembly itself. It is not an easy task to discover the real authors of a constitution. The plans around which discussions are carried on in a constituent assembly might have been—and in many cases are—worked out by leading men and groups only remotely connected with the assembly. Inside the assembly itself the real work is done by influential leaders and select committees which are generally small in size. It is only the broad principles on which the constitution is to be based and the final draft of the constitution

that are discussed in the assembly as a whole. There is nothing peculiar or strange in all this. It is just the process by which all democratic legislatures and parliaments function in modern times. Parliaments are only one of the organs associated with the democratic process of government. The electorates, the party, the standing and select committees and the cabinets have each their part to play and it is the division of labour among them that enables the parliaments to perform their tasks in an efficient manner. One need not therefore be frightened if for the sake of representing different shades of public opinion in the country a constituent assembly has to become large in size. However unwieldy it may appear to be when looked at superficially, its capacity for arriving at sound conclusions is not in any way diminished by its large size if its procedure and methods of work are properly organized.

A brief reference to the organization and procedure of a few constitution-making bodies of modern times will make this point quite clear.

#### IN THE U. S. A.

The Federal Convention which framed the Constitution of the United States of America was summoned in response to a call issued to the various states by the Congress of the Confederation. The Convention assembled in Philadelphia in May 1787. Most of the leading men in the political life of the country—men like Washington, Benjamin Franklin, Madison and Hamilton were there as delegates. George Washington was unanimously elected its President. At his suggestion a secretary was chosen to report the proceedings and actions of the Convention. A committee composed of three delegates was appointed to draw up the rules of procedure and the rules so drawn were accepted by the Convention. It was agreed that seven out of the thirteen

states should constitute a quorum, that each State should have one vote and that the majority vote of the States should be required to decide all questions. It was also resolved that meetings should be held behind closed doors and perfect secrecy should be kept regarding all proceedings. All historians are unanimous in praising this rule of secrecy and its significance in the successful solution of many controversial problems by the Convention. As Professor McLaughlin observes: 'The reason for this secrecy is obvious; it enabled the members to speak plainly, if they would; it prevented tentative or vaguely-formed proposals from going forth to the press; it precluded the likelihood of prejudice or opposition based on incomplete evidence and it allowed the Convention to present its conclusions. Though leaders proposed at the beginning to correct and enlarge the Articles of Confederation, the plan they entered upon was so different from that of the Articles that they might well have feared an outcry of protest from the public had their purpose been fully exposed to view.' Where problems of an acutely controversial character have to be solved secrecy has great virtues about it. It was because of this that the National Convention which framed the Constitution of the Union of South Africa held its sessions in absolute secrecy.

Three important plans were considered by the Convention. One was the Randolph Plan sponsored by the delegates from Virginia; the other was the Paterson Plan from New Jersey; and the third was Hamilton's Plan. These were discussed in committees of the whole. Resolutions were passed on them in general terms and a Committee of Detail was appointed to draft a constitution in conformity with these resolutions. The constitution so drafted was then taken up by the Convention and considered point by point. A Committee of Style was then appointed

charged with the task of putting the conclusions of the Convention into definite form. Then the Convention debated the plan as it finally emerged from the Committee of Style and adopted the Constitution in its final form. There is a great deal of similarity between the controversial problems with which the Convention was faced and those with which India is faced today. The question of no union, one union or many unions; of Confederation *versus* Federation; of large communities and small communities; of majority domination and the safe-guarding of minority interests; of the partitioning of bigger states to satisfy the sentiment of the smaller ones—these were the centres of debate in the Federal Convention. It was through the influence of veteran statesmen like Washington and Franklin, the work of committees and the willingness of all the delegates to listen to argument and modify their preconceived opinions that the success of the Convention in drawing a satisfactory constitution was achieved.

#### IN GERMANY

In Germany of 1918-1919 it was the Provisional Government consisting of six Commissioners belonging to the majority Socialist Party which came into power after over-throwing all its opponents that issued the call for the election of delegates to the Constituent Assembly and enacted the law regulating the election. The election took place as ordered and the Assembly met at Weimar in February 1919. In his opening address Herr Ebert the chairman of the Council of Commissioners referred to the Assembly as a fully sovereign body competent to enact a fundamental law for establishing a new governmental system of a legal character in the country. The Assembly proceeded to enact a Provisional Constitution and established the previous Provisional Government which was till then an extra-legal body, on a legal

basis. It also elected Herr Ebert as the first President of the National Republic and he formed anational cabinet in accordance with the articles of the provisional Constitution.

Even before the Constituent Assembly was convened the Provisional Government appointed Professor Preuss as Secretary of the Interior and authorized him to prepare a draft of the new National Constitution. He did so with the help of Professor Max Weber. This draft was subsequently modified and it was the second draft prepared by him that was laid before the Constituent Assembly on the day after its opening. Its chief feature was the unitary character of the Reich to be created. It drew largely upon the Constitution framed by the Frankfurt Parliament of 1848-9 and upon the constitutional laws of England, the United States, Switzerland and France.

This unitary character roused a good deal of opposition from the advocates of particularism and State rights. The Provisional Government therefore thought it prudent to refer the draft to a separate conference of a hundred representatives of the States. In its turn this conference appointed a Commission and referred the draft to it for further deliberations. A still smaller committee chosen from the Commission finally examined the draft and revised it in several respects. It was this modified draft that received the approval of the Commission and the conference. It was then submitted by the Provisional Government to the House of States under the Provisional Constitution. As a result of this another draft was prepared and it was this that was finally submitted to the Constituent Assembly.

After the first reading of this draft the Assembly appointed a Committee of 28 members representative of all political parties to examine the draft. The Committee considerably modified the text of the draft and submitted the modified document to the Assembly. The Assembly consi-

dered it in its plenary session and introduced several modifications in it. It was the draft thus modified that was finally adopted as the Constitution of the German Republic. The closing vote at the end of the third reading of the draft stood 262 for and 75 against its acceptance, with one abstaining vote. Those who voted against it were the German Nationalists, the German People's Party, the Independent Socialists, the Bavarian Agrarian Association, and one member of the Bavarian People's Party.

#### IN AUSTRALIA

In Australia there was no question of a provisional government for making arrangements to frame a new constitution for a federated Commonwealth as the whole movement was the outcome of an evolutionary process. But even there the statesmen who were individually in favour of a federal Commonwealth being established had to wait before public opinion was ripe for it. It was only when the people were willing to elect delegates to a Convention for framing a Federal Constitution that the movement became really effective.

As soon as the Convention met it elected as President Mr Kingston, the Premier of the colony in which its sittings were held, and appointed Mr Blackmore Clerk of the Convention. It next elected Mr Barton Leader of the House and entrusted him with the work of moving a series of resolutions enunciating a few leading principles and outlining a Federal Constitution in a general way. He moved these resolutions and for seven days a debate was carried on over them and they were approved on 31st March 1897. Then three Committees were appointed and all the members of the Convention were apportioned among them. One was a Constitutional Committee of four persons from each delegation and its business was to consider the question of constitu-

tional machinery and the distribution of functions and powers, and prepare and submit to the Convention a draft Constitution Bill. The second was a Finance Committee consisting of three members from each delegation and to it was left the consideration of matters relating to finance, taxation, railways and trade regulations. The third was a Judiciary Committee of two members from each delegation and it was to consider provisions relating to the establishment of a federal judiciary. The several premiers were to be ex-officio members of each Committee. By 8th April the Committees finished their work. The Finance and Judiciary Committees reported to the Constitutional Committee and this in its turn appointed a Drafting Committee of three persons who prepared a Bill which was submitted to the Convention on 12th April.

Mr Barton as the Leader of the House expounded the Bill. Then the Convention went into a Committee of the whole house and there were several heated debates on some controversial clauses regarding money bills, equality of representation and the control of navigable rivers. The bill was reported to the Convention on 22nd April, and the next day it was adopted.

On 2nd September the Convention met again to reconsider the draft Constitution in the light of the amendments suggested by the several colonial legislatures. The Convention adjourned again on the 24th September. It met for its final session at Melbourne on 20th January 1898. The whole Bill was thoroughly reconsidered by the Convention sitting as a Committee of the whole and revised by the Drafting Committee. On 16th March 1898 the revised Bill was finally adopted by the Convention. Some difficulties arose later on but these were considered and settled by the Premiers' Conference of 1899. All this goes to show that the preparation and drafting of the constitutional Bill depended very



much on leading individuals and the special committees which went into details.

#### IN IRELAND

In Ireland the task of framing a Constitution for the Irish Free State was taken up by the provisional government as soon as the Treaty between England and Ireland received the approval of the Irish Parliament. It set up a Constitution Committee of ten members with Michael Collins, the head of the Provisional Government, as the Chairman. The Committee was given one month to prepare a draft. As a matter of fact it produced three schemes based to a considerable extent on the constitutions of the new democratic States of Central and Eastern Europe. Out of these schemes the Provisional Government prepared a final draft and took it to London for consultation with the British Cabinet as to the question of its conformity with the terms of the Treaty. The final draft on which agreement was reached between the Law Officers of the British and Irish Governments was published on June 15, 1922, the eve of the elections to the Constituent Assembly. The Constitution Bill was introduced on September 18, 1922. And after the second reading on 20th and 21st the Assembly went into a Committee. In the course of the debates the draft was considerably revised. The revised Bill was subjected to several amendments during the later stages of discussion in the Assembly and it received its final approval on October 25, 1922. The Bill was in the main the work of the expert committee although it underwent several modifications in the Assembly.

From these and other examples of constitution-making it becomes clear that it is from a variety of sources and through the combined work of a number of agencies in and outside the constituent assembly that a constitution emerges in its final form. Individuals, groups and com-

mittees contribute much more to the final shaping of the constitution than the assembly as a whole. It is in this perspective that the significance of the Constituent Assembly is to be measured.

#### 4. CONSTITUTION-MAKING FOR A DEPENDENT INDIA (1773-1935)

Partly through conquest and partly through diplomacy the East India Company seized power in India and as a consequence of this the British Parliament became the constitution-making body for the country—although it may be argued that a dependency cannot be said to have a constitution in the scientific and political sense of the term. In this capacity the Parliament framed constitutions for India on several occasions beginning with the Regulating Act of 1773 and ending with the Government of India Act of 1935. During all this period the British Parliament was the machinery used for constitution-making. It had both the political and the legal power to do it.

##### THE PARLIAMENT

There are two features of the Parliament which require notice at the outset. It was in the first place an assembly made up of two houses and each house was considerably large in size. In the latter part of the eighteenth century when it first began to legislate for India the House of Lords contained more than 590 members and the number went on steadily increasing till by 1935 it came to about 750. The House of Commons also contained more than five hundred members when the Regulating Act was passed and the number rose to more than seven hundred when the Govern-

ment of India Act of 1919 was placed on the statute book. It was thus a body of very huge size that was engaged during the last nearly two centuries in framing constitutions for India. In the second place the knowledge of the special needs and requirements of India which the members of Parliament possessed was most meagre. The large majority were completely ignorant of them. The interest they had in Indian affairs was not of any noteworthy character. The observation made by Montagu and Chelmsford in 1917 that 'the interest shown by Parliament in Indian affairs has not been well-sustained or well-informed', contains a large amount of truth in it.

It has however been already pointed out that it is only in a formal sense that the constitution-making body frames a constitution. As a matter of fact the constitution as it finally emerges from such a body is the result of the co-operative work of several agencies—individuals, interested groups, and specially appointed committees. It is on the basis of the materials and information supplied by agencies like these that a constitution is enacted. While a constitution-making body gives to the constitution the political strength and sanction required to put it into effective operation, the soundness and the virtue of the constitution depends much more on the agencies which the constitution-making body uses in carrying out its work. From this standpoint it may be said that the agencies used by the British Parliament in obtaining the data required for constitution-making for India have passed through several stages of evolution since 1772.

#### METHOD OF SELECT AND SECRET COMMITTEES

In the period between 1772 and 1853 the chief agency was the Select and Secret committees appointed by Parliament to make enquiries about the state of affairs in India.

This was done regularly and systematically whenever it wanted to undertake legislation of a constitutional character for India. It is true that the members of these committees had not more knowledge of India than the average member of the Parliament itself. But they acquired that knowledge partly through study and to a much greater extent through taking the evidence of persons who returned to England after service in India under the East India Company. In a sense therefore, it may be said that from the very beginning Indian Civil Servants had a great deal to do in moulding and shaping the character of the British governmental system in the country. In addition to these there were also formal and informal consultations with the Court of Directors and other interested groups. The influence of 'pressure politics' has always been great.

The Regulating Act of 1773 was preceded by an enquiry into the affairs of the East India Company by a Select Committee of thirty-one members presided over by General Burgoyne. Its work was supplemented by a Secret Committee of thirteen members. The Select Committee produced twelve reports and the Secret Committee six, and it was on their basis that the Regulating Act was passed in 1773. The Act of 1781 which amended the Constitution of the Supreme Court in Bengal was based on the Report of a Select Committee appointed to enquire into the administration of justice in India. The voluminous reports that were submitted by the Select and Secret Committees appointed in 1781 had a great deal to do with the nature of the provisions contained in Fox's India Bill of 1783 and Pitt's India Act of 1784. Pitt made a strong point of his having consulted the Board of Directors and the General Court of the East India Company before framing his bill. So great was the importance attached to enquiries by Select Committees that in connexion with the renewal of the charter of the Company in

1813 the Parliament appointed its Select Committee so early as 1808. The Committee sat for four years, published many reports, the most famous being the Fifth Report which is a standard authority on Indian Land Tenures and the judicial and police systems of the time. Similarly the Charter Act of 1833 which brought about fundamental constitutional changes was preceded by a searching Parliamentary enquiry. The same was the case in respect of the Charter Act of 1853. It may be incidentally observed that the authorities in England do not seem to have attached much importance during this period to consulting the Government in India before undertaking constitutional legislation, although we find Governors-General like Warren Hastings, Wellesley and Dalhousie sending despatches and memoranda suggesting to the Court of Directors or the Board of Control certain lines of reform.

#### 'THE MEN ON THE SPOT' METHOD

In the period after 1858 this method of enquiries through Select Committees was abandoned by Parliament. In 1908 Lord Morley the then Secretary of State for India discussed the question of reviving it but did not find much practical use for it. On this Messrs Montagu and Chelmsford observe: 'Our own study of political development in India has led us, notwithstanding the force of these (Morley's) arguments, to one important conclusion. It is that Parliament's omission to institute regular means of reviewing the Indian Administration is as much responsible as any single cause for our failure in the face of growing nationalist feeling in India, to think out and to work out a policy of continuous advance.....We think that there is a strong case for reviving in some form the machinery for enabling Parliament to discharge the weighty responsibility which lies upon it and which indeed the announcement of August 20

categorically acknowledges, for determining the stages and the pace of India's future political progress.' This conclusion of course loses much of its validity and force now that the principle of self-determination for India is recognized.

After 1858 the Government consisting of the Viceroy and his Council became the chief agency on which the Parliament—through the Secretary of State for India—relied for information and for proposals on constitutional reform. This was one of the indirect results of the mutiny of 1857-8 which was partly attributed to the British ignorance of opinion in India. The procedure after 1858 was for the Viceroy and the Secretary of State to settle important constitutional issues through correspondence. Such issues were placed before the Cabinet for its approval and formed the basis of subsequent legislation. The Viceroy fortified himself by having his views examined by his own Council while the Secretary of State had Special Committees of his India Council to consider the proposals put forward by the Government of India. The prestige value attached to the Government of India initiating proposals for constitutional reform is brought out in one of Lord Minto's despatches to the Secretary of State which contains the following statement: 'But we, the Government of India, cannot shut our eyes to present conditions. The political atmosphere is full of change; questions are before us which we cannot afford to ignore, and which we must attempt to answer; and to me it would appear all-important that the initiative should emanate from us, that the Government of India should not be put in the position of appearing to have its hands forced by agitation in this country or by pressure from Home—that we should be the first to recognize surrounding conditions and to place before His Majesty's Government the opinions which personal

experience and a close touch with the every-day life of India entitle us to hold.'

The Indian Councils Act, 1861, which practically formed the framework of the internal constitution of India down to 1919 was to a great extent based on the proposals initiated by Lord Canning the first Viceroy. The Indian Councils Act, 1892, 'was really initiated by discussions in Lord Dufferin's time in which Sir George Chesney, Sir Charles Aitchison, and Mr Westland (members of the Viceroy's Council) took a prominent part.' They were constituted into a committee to work out the proposals. The Minto-Morley Reforms of 1909 were based on the recommendations made by the Viceroy Lord Minto in consultation with a Committee of his Council; and it is well known that on many essential matters like the introduction of communal electorates Lord Morley with all his democratic liberalism had to yield to the Viceroy. It was first the Government of Lord Hardinge and next the Government of Lord Chelmsford that suggested the need for and the nature of further constitutional changes and the latter insisted in 1917 that a formal declaration of British policy in regard to India's future was necessary. The suggestion was given effect to in the famous announcement made on August 20, 1917, in the House of Commons by Mr Montagu, the Secretary of State for India. Lord Chelmsford the Viceroy and his Government had much to do in formulating the scheme of constitutional reform finally embodied in the Act of 1919. The importance of the Government of India in this connexion becomes all the more clear when it is known that very many essential matters of detail regarding franchise, constituencies, etc. were left for being settled under its rule-making power.

## ROLE OF INDIAN PUBLIC OPINION

Another agency which the Parliament had to make use of in determining the nature of constitutional reforms to be introduced in India was Indian non-official public opinion as expressed through various political organizations like the Indian National Congress. It was in the period after 1880 that this agency became an important factor and its importance has continued to increase with the advance of time, so much so that today it may be regarded as the most decisive factor in shaping the views of Parliament. Till about 1917 it was only in an informal and indirect manner that the views of these political organizations were taken into consideration. They were not invited to express their views. They, of their own accord, communicated to the authorities the resolutions they passed at their annual conferences and made them acquainted with the trend of political opinion in the country. Such was, however, the weight and authority of these communications that it was impossible for the Government of India to put forward any proposals without taking into consideration the suggestions and opinions contained in them—especially those of the Indian National Congress. For instance the despatch which the Viceroy Lord Dufferin sent to the Home Government in 1888 contained proposals not very much different from those put forward by the Congress. Later on the detailed suggestions made by Lord Morley in 1906 were clearly based on the Congress demands. As time went on it became difficult for Parliament to ignore resolutions like those passed in 1906 by the Congress that 'the system of Government obtaining in the self-governing British Colonies should be extended to India,' or the resolution passed in 1915 by both the Congress and the All-India Muslim League that the King-Emperor should be pleased to issue a proclamation announcing that it is the aim and intention of British policy to confer self-government on India at an early date.



The significance of public opinion as an agency for acquainting Parliament with the nature of reforms to be introduced in India was by 1917 completely understood by the British authorities. So when in 1917 Montagu and Chelmsford toured in India they consulted Indian opinion formally and directly, receiving deputations at each of the places they visited and giving interviews to representative men. Face-to-face discussion was substituted for representation through paper correspondence. A similar procedure was adopted by the Committee which went into the question of Division of Functions and Franchise. A little later when the Government of India Bill was before the Joint Select Committee of Parliament Indian witnesses were invited to London to give evidence before that body. All this goes to show that by 1919 Parliament came to make a larger use of Indian opinion in framing a constitution for India.

#### RESULT OF NATIONAL AGITATION

In the next stage Parliament was compelled by the force of circumstances and the growing intensity of national agitation now led by Mahatma Gandhi to give an active share to Indian political organizations in the formulation of constitutional policy and schemes instead of merely consulting them. The non-co-operation movement and the general awakening of the masses were creating in the country a new constituent power. Its strength was felt for the first time when the Indian Statutory Commission under Sir John Simon was appointed in 1927 to examine whether Indians were fit for being entrusted with a further instalment of responsible government. The Commission was a purely British one. There was no Indian member on it. Its authority was repudiated by all political bodies in this country. It was then realized that any constitution framed by Parliament on the basis of recommendations made by a

body on which there was no Indian representation would be unworkable. And it was to remove this defect that two substantial changes were introduced. One was the method of 'Joint Free Conference' consisting of the seven British Commissioners on the Simon Commission and a corresponding body of representatives chosen by the Indian Legislatures—Central and Provincial—which was to go into all the documents and the material prepared by the Government of India and the Local Governments and into all the evidence given in explanation or amplification of them; and it was understood that any documents that might be prepared by the Indian Joint Committee would be made an annexe to the Report of the Commission so that 'both might be presented to the King Emperor and made public, at the same moment'. Sir John Simon pointed out that one of the merits of the method of Joint Conference was that, besides securing due recognition of equal status, it provided 'the opportunity for that free exchange of views and mutual influence which are best calculated to promote the largest measure of agreement that is possible'.

The second change was the method of the Round Table Conference. This was a Conference consisting of the representatives of the political parties in Britain, of the principal parties and interests in British India and of the Indian States, for the consideration of the political and constitutional problems of India in the light of the Report of the Simon Commission, so that His Majesty's Government might have before it the views of all shades of opinion in India in formulating the proposals to be finally laid before Parliament. The first Round Table Conference consisted of eighty-nine members, sixteen representing the three British parties, fifty-seven representing British India and sixteen the Indian States. The significance of this Conference lay in its having been the first occasion when Parliament was

made to realize that in the matter of supplying of what may be called the raw materials of constitution-making Indians should have a direct and substantial share.

#### RAW MATERIALS AND FINISHED PRODUCTS

This distinction between the supply of raw materials and the making of the finished product is of the greatest importance. What Sir John Simon recognized in 1928 when he proposed the method of Joint Free Conference and what the British Cabinet recognized when in 1930 they called the Round Table Conference was not the right of Indian Representatives to have a share in the actual constitution-making, in the manufacturing of the final finished product. That was to be the sole right of the British Parliament, a right and responsibility which could never be shared with others. The Indian representatives could come in only for advice and consultation. The power of final decision should lie with the British Parliament itself.

This was the considered view of the British authorities until August 1940. It was given expression to in no unmistakable terms in the announcement of August 1917 in which it was laid down that 'the British Government and the Government of India, on whom the responsibility lies for the welfare and advancement of Indian peoples, must be judges of the time and measure of each advance.' A stronger emphasis was laid on this aspect by the Joint Select Committee on the Government of India Bill, 1919. They observed : 'The Committee have enlarged the preamble so as to include all parts of the announcement of the 20th August 1917. Their reason for doing so is that an attempt has been made to distinguish between the parts of this announcement and to attach a different value to each part according to opinion. It has been said, for instance, that whereas the first part is a binding pledge, the later part

is a mere expression of opinion of no importance. But the Committee think that it is of the utmost importance, from the very inauguration of these constitutional changes, that Parliament should make it quite plain that the responsibility for the successive stages of the development of self-government in India rests on itself and on itself alone and that it cannot share this responsibility with, much less delegate it to, the newly elected legislatures of India.' So in the preamble to the Act of 1919 prominence was given to this responsibility of Parliament. It was also emphasized by Lord Irwin in the declaration which he made as Viceroy in 1930 with a view to dispelling all doubts regarding Dominion Status as the goal to which the announcement of 1917 naturally led. That the Indians would only be consulted and that the power of final decision would lie with the Parliament was the view of the authorities in October 1939. In the declaration issued by the Viceroy on October 17, it was stated: 'And I am authorized by His Majesty's Government to say that at the end of the War they will be very willing to enter into consultation with representatives of the several communities, parties and interests in India, and with the Indian Princes, with a view to securing their aid and co-operation in the framing of such modifications (in the constitution) as may seem desirable.'

As a consequence, however, of the development which the second World War has brought about within this country and outside it there has been a change in British official opinion regarding the nature of the representative body that should frame a constitution for post-war India. It might have been quite appropriate for the British Parliament to go on making constitutions for India so long as her status was that of a dependency whatever might be the ultimate goal. But when once it is accepted that India should become a Dominion enjoying a status of equality with the other

Dominions in the British Commonwealth—and this is the provisionally accepted official view of the matter—it logically follows that the constitution for India as a Dominion should be framed not by an outside body but by Indians themselves. An inkling into this view of the matter was given by the Viceroy in what is called the August Offer of 1940 when he said: ‘The second point of general interest is the machinery for building within the British Commonwealth of Nations the new constitutional scheme when the time comes. There has been a very strong insistence that the framing of that scheme should be primarily the responsibility of Indians themselves, and should originate from Indian conceptions of the social, economic and political structure of Indian life. His Majesty’s Government are in sympathy with that desire and wish to see it given the fullest practical expression, subject to the due fulfilment of the obligations which Great Britain’s long connexion with India has imposed on her and for which His Majesty’s Government cannot divest themselves of responsibility.....His Majesty’s Government authorize me to declare that they will most readily assent to the setting up after the conclusion of the War with the least possible delay of a body representative of the principle elements in India’s national life in order to devise the framework of the new constitution.....’ In many of the speeches made by Mr Amery, the present Secretary of State for India prominent expression has been given to this view—that Indians have a right to frame their own constitution. On one occasion he stated: ‘We no longer think in terms of India’s advance towards full control of her own destiny by stages decided here and under a constitution laid down by this House. We think, instead, in terms of India’s inherent right to that freedom under a constitution of her own devising.’ In the draft declaration which Sir Stafford Cripps brought with him for

discussion with Indian leaders in 1942 were included the following clauses :

(a) Immediately upon the cessation of hostilities, steps shall be taken to set up in India, in the manner described hereafter, an elected body charged with the task of framing a new constitution for India. (b) Provisions shall be made, as set out below, for participation of the Indian States in the constitution-making body. (c) His Majesty's Government undertake to accept and implement forthwith the constitution so framed subject only to.....'

It is therefore now clear that the official view as regards the body that has to frame the future constitution of India has undergone a revolutionary change. In a sense the British Parliament has given up its right to do it. It is now for the Indians themselves to determine the nature, composition, and procedure of the body that should be entrusted with the work of framing a constitution for their country. This result has been arrived at by a gradual process. In the first stage Parliament framed constitutions for India in consultation with the Government of India ; and in more recent times it had to do it after considering the views and opinions of the politically-minded sections of the people of India and the organizations set up by them. In the course of the last few years the claim of the British Parliament to frame a constitution for India has come to be questioned. The claim has come to be resisted more and more strongly ; and today the strength of this resistance has become so formidable that the British Parliament has preferred to surrender in a sense its claim. The immediate question therefore is what that body is to be which should take over the constituent functions hitherto discharged by the British Parliament.

There are many who feel that Parliament should have recognized long long ago this inherent right of Indians to

frame a constitution for their country. They, however, forget two things. Political opinion undergoes a change only as a result of new concrete situations. It is only during the last few years that the nationalist movement in India has become a real force and has therefore been able to bring about a change in the British official outlook. It is the growing power of the Indians—and not their abstract right to self-determination—that is really responsible for the changed attitude of Parliament. There is also another consideration that has to be kept in mind in this connexion. It is only during the last one decade or so that political opinion in India began to question the right of the British Parliament to frame a constitution for the country. For years after the political awakening of the educated classes leading organizations took it for granted that the ultimate decision regarding the constitutional reforms to be introduced should lie with the British themselves.

#### EVOLUTION OF NATIONAL OPINION

In its early days the Indian National Congress was content with passing resolutions and communicating them for action to the British authorities. Parliament's right to accept or reject them was assumed as an axiomatic truth. The Congress-League scheme of 1916 which according to Messers Montagu and Chelmsford was 'the most complete and most authoritative presentation of the claims of the leading Indian political organizations', and which commanded a large measure of support in the country was only a scheme put forward for the consideration of the authorities. That India should have a constitution made by the Indians themselves was an idea which may be said to have been born about the year 1919 when in consequence of the first World War the slogan of 'National Self-determination' was very much in the air. Even then it was a nebulous idea.

According to Mahatma Gandhi who referred to this subject in 1922 the swaraj constitution should be ratified through an Act of Parliament even though it might and ought to be framed by India's chosen representatives. One of the most important discussions on this question took place in the Central Legislative Assembly in 1924 when Pandit Motilal Nehru introduced a resolution for summoning 'at an early date a representative Round Table Conference to recommend with due regard to the protection of the rights and interests of important minorities the scheme of a constitutional reform for India'. In the speeches delivered by Pandit Nehru and Pandit Malaviya a very strong case was made out in favour of an Indian constitution framed by the Indians themselves but even they accepted the necessity of having any such constitution accepted and ratified by the British Parliament. According to them the Round Table Conference should have on it representatives and spokesmen on behalf of the Government also. Even the All-Parties Conference of 1928-9 which was the first representative body to frame a complete constitution for the country did not repudiate the authority of the Parliament.

It was however just about this time that the doctrine of self-determination was becoming an active factor in the political situation. At its Lahore session in 1929 the Indian National Congress voted for complete independence. The civil disobedience movement started in 1930 and the events that followed it gave added impetus to the doctrine. Finally came the White Paper in 1934 containing the British Cabinet's proposals for constitutional reform based upon the deliberations of the three Round Table Conferences. So disappointing and so reactionary were they from the point of view of the nationalists that the Working Committee of the Congress passed the following resolution in which for the first time a demand for a wholly Indian-made constitution



was put forward. The resolution stated: 'The White Paper in no way expresses the will of the people of India, has been more or less condemned by almost all the Indian political parties, and falls short of the Congress goal, if it does not retard the progress towards it. The only satisfactory alternative to the White Paper is a Constitution drawn up by the Constituent Assembly elected on the basis of adult suffrage.....' A similar resolution was passed in May 1934 by the Swarajya Party Conference: 'This Conference claims for India in common with other nations, the right of self-determination and is of opinion that the only method of applying that principle is to convene a Constituent Assembly representative of all sections of the Indian people to frame an acceptable Constitution.' Speaking on this resolution Mr Bhulabhai Desai said: 'Self-determination was being replaced by British determination in the form of the White Paper proposals.' And this statement correctly represents the logical connexion between the unsatisfactory nature of the constitutional scheme put forward by the British authorities and the demand for an entirely Indian-made Constitution.

This brief survey of the evolution of non-official opinion in favour of a Constitution for India being framed entirely by Indians shows that what the British conceded in 1940 was demanded only six years earlier by the Indian nationalists. Within a short period there came about a coincidence between Indian and British opinion on this fundamental issue. All are now agreed that the future Constitution for India—and it is to be a free and self-governing India—should be framed by Indians themselves. As Professor Coupland has pointed out, such a constitution will be in conformity with Indian conceptions of the social, economic and political structure of Indian life; it will have a better chance of standing up to criticism than an article imported

from abroad and above all it will — being a home-made one — acquire a sanctity in Indian eyes which only Indian authorship can give it.

## 5. CONSTITUTION-MAKING FOR A FREE INDIA

### FUNDAMENTAL REQUIREMENTS

In answering the question, ‘by what kind of body the constitution for a free India is to be made?’ it must be kept in mind that any such body should satisfy two fundamental requirements. In the first place it must be a democratically constituted body and should have as its members only those who have faith in democracy and in a system of government which is ultimately responsible to the people at large. Both theory and practice are at one in the view that such a body can come into existence only when its members are chosen directly or indirectly by the people themselves. In no other way is it possible to create a body truly representative of the people and determined to frame a democratic type of constitution. In the second place the constitution-making body must be one which has behind it the power to put into effective operation the constitution which it frames. Such a power implies that the body is in a position to command the active support of the people of the country, which alone will endow it with those moral resources that form the principle source of strength of any governmental system. It also implies that it has in addition the required material and military resources without which in the last resort no political system can function. Without this power a constitution framed by a body, however democratic in its

structure, will be a mere paper constitution and not an effective one at all.

Controversies that have so far gathered round this question of the machinery for India's constitution-making are practically the outcome of doubts entertained as to whether under the circumstances now existing in the country it is possible to create a constitution-making body which can at the same time satisfy both these requirements. It may not be an impossible task to call a constituent assembly elected by universal suffrage and therefore truly representative of the people of the land. But the question is asked whether such an assembly will have behind it the organized support of the millions of people in whom political consciousness and the feeling of patriotism are still dormant and whether it will be able to command the loyalty and devotion of the defence forces as they exist at present or whether it can organize within a short period of time a well-equipped national army warmly devoted to the service of the new State it proposes to create. It is their contention that there are today many powerful elements in India's national life—prominently the Princes, the Muslims and the Scheduled Classes—who may withhold support to a Constitution framed by such a body and that any such attitude adopted by them will have its repercussions on the loyalty of the existing military forces. There are other objections which have been put forward to a democratically elected constituent assembly but the real crux of the problem is one relating to the power which it will be able to command.

#### IMPORTANCE OF POWER

This is the implication of the contention of the British authorities that though they are prepared to transfer power to Indian hands they should know in advance what the

character of the Government would be into whose hands they will be called upon to transfer power. How much significance they attach to power is brought out by Mr Amery, the Secretary of State for India, in this observation: 'Political status whether described as Dominion Status or otherwise, is a thing which is not conferred like a decoration, but is acquired by the power to exercise and defend it, and in the world of today that power is more necessary than ever before.' The same note is struck in the well-known August (1940) offer of the Viceroy where it is stated: 'It goes without saying that they could not contemplate transfer of their present responsibilities for the peace and welfare of India to any system of government whose authority is directly denied by large and powerful elements in India's national life. Nor could they be parties to the coercion of such elements into submission to such a government.' It was in the context of the demand made by the Congress that 'the Indian people must have the right of self-determination by framing their own constitution without external interference,' that the Viceroy issued his statement. This is also the view of many non-official British publicists of whom Sir Maurice Gwyer may be taken as a representative. He has recently observed: 'The question has also been asked why the transfer of power should involve anything more than the taking over from the British of the existing government machinery, so that everything would go on as before, save that there would be no British to settle or execute policy..... The machinery of government does not run by itself; there must be persons in control of it; and those persons must constitute a body with a joint or common purpose. In the present case it must surely be a body which commands the general allegiance of those whom it is to control; since *ex hypothesi* one of the main reasons for the change-over is to substitute a government based upon the consent of the

governed for a government of the strong hand. It would, however, be affectation to contend that such conditions exist in India at the present moment, however much that may be deplored; and disagreeable facts unfortunately do not vanish merely by denying their existence.....'

It is not only from the side of Britain that attention is being drawn to this need for power. It is also the view of the leaders of the Indian nationalist movement. It is the implication of the doctrine that real power should be acquired before an Indian Constituent Assembly can meet. This was what Mahatma Gandhi meant when he said that 'the question resolves itself into whether the British Government desire to part with power and open a new chapter in their own history' and when he confessed on another occasion that the British Government would not ask for a common agreement, if they recognized any one party to be strong enough to take delivery. The Congress, it must be admitted has not that strength today.' Pandit Jawaharlal Nehru who may be regarded as the real author of the idea of a Constituent Assembly is much more clear and emphatic on this point. He observes: 'I see no difficulty, except one, and that is an important one, in the way of such a constituent assembly being elected and functioning.....The one difficulty I referred to is the presence and dominance of an outside authority, and that is the British Government. It is clear that so long as this dominance continues no real constituent assembly can meet or function. So that an essential preliminary is the development of sufficient strength in the nation to be able to enforce the will of the Indian people. Two opposing wills cannot prevail at the same time, there must be a struggle between them and a struggle for dominance, such as we see today in India.' It is only when a democratically elected constituent assembly commands all that

power which the British commanded till the outbreak of the non-co-operation movement in the country that it will be in a position to frame a constitution which it can put into effective operation.

#### A NEGOTIATED CONSTITUTION

An analysis of the situation shows that there are only two alternatives—the winning of democratic freedom through negotiation with Britain and her allies in the country, and the winning of freedom through a revolutionary struggle non-violent though it be. For both there are precedents within the British Empire. In Australia and to some extent in Canada and South Africa constitutions were framed through negotiation; in the United States and Ireland a struggle with Britain preceded the framing of their constitutions. If the freedom of India is won through negotiation with Britain and her allies in India the Constitution will necessarily have to be framed by a body to which the British are prepared to transfer power and in the composition of which they will have a definite say. The question of the British allies in India is of much importance in this connexion, for there is some truth in the following words of Mr Amery: 'What I want to emphasize is that the British Indian Empire is not something imposed upon India from without as a result of deliberate conquest by this country. It is an indigenous system of government which spread over India from within in response to India's need for peace and unity. It was created, no doubt, under British leadership. But at every stage in this process Indians have played their part, in the fighting forces and civil administration or as allies.' Negotiation always implies that the decision is arrived at on the basis of a compromise.

### THE AUGUST OFFER

From the statements and declarations made by British authorities it is possible to get an idea of the kind of machinery which they should like to establish for framing India's Constitution. The Viceroy's August (1940) offer and the British Cabinet's declaration brought by Sir Stafford Cripps in 1942 are of importance in this connexion. The August offer stated : ' His Majesty's Government authorize me to declare that they will most readily assent to the setting up after the conclusion of the war with the least possible delay of a body representative of the principal elements in India's national life in order to devise the frame-work of the new constitution.' No objection whatever can be taken to the future constitution being framed by such a body if it is a really representative one. In such a case it will not be very much different from the Constituent Assembly advocated by the Congress. But the Viceroy's formula is vague in respect of many essentials and until more authoritative light is thrown on them it will be difficult to get an exact picture of the body which the Government has in mind.

### THE VAGUENESS

There is first the vagueness regarding the nature and number of the 'elements in India's national life'. This term 'elements' came into use in official statements and documents only after 1939. Previous to that the references were to political parties, communities and interests. Even these terms have a certain amount of vagueness about them and it is well known that the Joint Memorandum submitted to the Joint Parliamentary Committee on Indian Constitutional Reform (1935) wanted to have it removed at least with reference to the terms 'Communities' and 'Interests' although the Committee did not do anything to precisely define them.

The term 'Elements' is much more ambiguous. And the following observation of Mr Amery has added to the confusion. According to him, 'the main elements in India's national life include not only political organizations or great religious and cultural communities, but they also include geographical and administrative elements, provinces of British India, more especially those which have not thrown away the responsibilities of self-government, and Indian States.' It therefore comes to this that in Mr Amery's view any group or organization acquires the character of an 'element' if it is recognized as such by the Government. Government's fiat is the basis of definition. Instead of all the Muslims being recognized as one element there is nothing to prevent Shias, Sunnis, Momins, etc. being recognized as different elements just as Scheduled Classes are separated from Caste Hindus, and Indian Christians from Anglo-Indian Christians. The suggestion that is now being put forward to treat the disbanded Indian soldiers as a separate element in India's national life shows how the wind blows.

Mankind has been classified by students of social sciences on a variety of bases according to the standpoint of each science — Anthropology, Ethnology, Economics, Geography, etc. It is recognized that a classification appropriate and valid from the point of view of one science is not appropriate from that of another. It is possible to arrive at a scientific definition of a 'political' group just as it is possible to arrive at definitions of economic or racial groups. But in the view of the Viceroy's formula the elements whose agreement is regarded as a requisite for framing a constitution do not consist merely of those groups which are politically significant but of all possible groups and sections into which the people of India can be classified on a territorial, linguistic, racial, religious, communal, and any other kind of basis. There is no precedent or justification for such a course.



## INDEFINITENESS

A second difficulty arises out of the fact that even in respect of any 'element' recognized as such the organizations purporting to speak on its behalf are very many and one cannot definitely say which of them has the authority to represent the 'element'. The Muslim League is not the only organization of the Muslims or the Mahasabha that of the Hindus. Similarly the Scheduled Classes, the Indian Christians, the Sikhs and all other communities have various rival organizations claiming to speak in their name. Here again the discretion is left entirely to the Government to include or exclude any of them from the elements in national life.

## WEIGHTAGE

A third difficulty is due to the formula having left vague the political weight that has to be attached to each of the elements. Is equal weight to be given to the 'Muslim' and the 'Hindu' elements? Or should the weight be in proportion to their numbers, their wealth or their political importance? In the past the weightage that was given in the legislatures and the administrative services to different communities did not proceed on any rational basis. It depended to some extent on their bargaining power and to a larger extent on the arbitrary will of the Government. In this connexion it is to be noted that in Mr Amery's statement quoted above a distinction is drawn between provinces which have and those which have not thrown away the responsibilities of self-government. This vagueness will only result in placing in the hands of the Government an extraordinary amount of power in determining the composition of the constitution-making body. Difficulties like these are bound to arise when once we depart from the normal practice of democracy—the practice of 'one man, one vote'.

### SILENCE ON ESSENTIALS

The formula also is silent as to how the representatives of each 'element' are to be selected. It speaks of the setting up of a representative body. It does not say whether the representatives will as in the case of the Round Table Conference be nominated by the Government. The Government may resort to an alternative method of calling on the organizations to send their representatives to the constitution-making body. Though this alternative has an element of popular choice about it, it is really very much different from the method of democratic election directly or indirectly by primary voters. There is no guarantee that the organizations invited by Government to send representatives are themselves representative of all the adults constituting the 'element' of which they claim to be the spokesmen. It will be nearer the truth to say that their membership will ordinarily be restricted to a small minority of the 'element'. Even the Indian National Congress and the Muslim League have as regular members only a small percentage of the people in whose name they think that they are speaking. Much worse will be the case with regard to the other organizations in the country. And when conflicting views are expressed by representatives sent by different organizations claiming to speak on behalf of an 'element' there is no method by which the real opinion of the 'element' can be discovered. The conclusion therefore that one is driven to is that the only commonsense method of discovering the will of any 'element' is by calling on all the adults belonging to it to elect its representatives. There may be some practical difficulties in preparing registers of such adults or in arranging for elections by large numbers of voters—difficulties pointed out by the Lothian Committee years ago. But these are not insuperable and it is the only safe and correct way of discovering public opinion.

The formula is also silent in regard to the method of voting in the constitution-making body it proposes to set up. Will each 'element' have one vote? Will representatives belonging to each 'element' be free to combine with those belonging to other 'elements' and to vote as individuals? Will decisions be arrived at on the basis of unanimity or bare majorities or special majorities? On the whole, therefore, the formula is not helpful in giving us a picture of the constitution-making body even in outline. Its silence and vagueness will have only one result. They will bring into existence a body in the composition of which the British authorities and their allies will have a predominant voice. Such a body will have no claim to frame a Constitution for a 'Free India'.

#### WEAKENS INDIA'S BARGAINING POWER

There is one other point for consideration in this connexion. It is recognized by all that several matters of importance relating to defence, retirement of civil servants, etc. will have to be settled through a treaty between England and Free India and that the constitution-making body will be the party on the Indian side to enter into such a treaty. But a constitution-making body chosen in accordance with the Viceroy's formula will not have the strength to bargain freely and effectively with England and fight for the real interests of India. For all practical purposes such a treaty will be a one-sided one and there is a danger of 'Free India' starting on her career with numerous restrictions imposed on her. There is nothing in a name. It does not matter much whether the safe-guards and special responsibilities envisaged in the Government of India Act of 1935 and which have caused so much resentment in the country are included in a Treaty binding on the country or in the Constitution Act itself, whether they are introduced

by the British representatives remaining outside the constitution-making body or inside it. What is required is a body which has strength enough to bargain effectively with England.

It is quite possible that the British authorities recognize the existence of difficulties like these in the working out of their formula but feel that the responsibility of solving them should be taken by the Indians themselves, and that their business is merely to suggest broad outlines of the course to be adopted while the details should be worked out by Indian leaders. There seems to be a strong feeling among the British that the sincere efforts which they so far made to solve India's problems did not receive due appreciation at the hands of Indians and that there is no further use in their troubling themselves with such problems. It is all a thankless task. This is what Professor Coupland says: 'There can be no question, it need hardly be said, of trying to draft a new Constitution for India. Such a task is far beyond one man's powers. The last attempt at constitution-making, the Act of 1935, took several years and engaged the labour of a great company of British and Indian statesmen. The making of the new Constitution, moreover, however deeply we in this country may be interested in it, is no longer our business.' And it is in a similar strain that Sir Maurice Gwyer expressed himself: 'A wholly new situation came into existence when the Act (of 1935), wisely or unwisely, was rejected by the Indian parties. Great Britain has accepted the rejection and will draft no more Constitutions for India; and India by the very fact of rejection has accepted the responsibility of drafting a Constitution for herself.....Nor can the responsibility be shared between India and Great Britain. There are of course certain aspects of any constitutional settlement which will need Great Britain's assent; but the main constitutional

instrument, the Constitution under which the people of India will thereafter be governed, or rather govern themselves, must be the work of Indian hands.'

#### CONCLUSION

From this survey we are led to the conclusion that the Viceroy's formula does not contemplate the setting up of a constitution-making body democratic in character and prepared to frame a democratic type of constitution even for the purpose of managing those affairs that are likely to be left in Indian hands after the treaty between England and India is concluded. But if the points of vagueness are removed and the 'elements' are precisely defined to include only those groups which have political significance and if the members representing them are chosen by a process of election through adult suffrage the formula will become a valuable one. In such a case it will not be very much different from the proposal of the Congress to have a Constituent Assembly elected by adult suffrage with the representatives of minorities like the Muslims elected by separate electorates. The idea of adult suffrage need not frighten any one. Even a realist like Sir Syed Sultan Ahmed has suggested in connexion with his constitution-making body the preparation of registers of adult Muslims and adult Hindus who might be literate or own a house or pay any tax. From this it is not difficult to go a step further and prepare a register of all adults.

#### CRIPPS' FORMULA

In the draft declaration made by the British Cabinet in 1942 and brought to India by Sir Stafford Cripps the nature of the constitution-making body for the proposed Indian Union was described with complete definiteness. According to this declaration, 'the constitution-making body shall

be composed as follows, unless the leaders of Indian opinion in the principal communities agree upon some other form before the end of hostilities :—Immediately upon the result being known of the Provincial elections which will be necessary at the end of hostilities, the entire membership of the Lower Houses of the Provincial Legislatures shall, as a single electoral college, proceed to the election of the constitution-making body by the system of proportional representation. This new body shall be in number about one-tenth of the number of the electoral college. Indian States shall be invited to appoint representatives in the same proportion to their total population as in the case of the representatives of British India as a whole, and with the same powers as the British Indian members.'

#### MERITS

The merit of this method is that it is sponsored by the British government and a constitution framed by such a body will be acceptable to the British; and the Government set up under it will have all power transferred to it without any difficulty. This constitution-making body will be a compact one of about 207 members, 158 from British India and 49 from the States. No body smaller than this can represent all the diverse interests and points of view prevailing in the country. It will be an elected and not a nominated body and the process of indirect election—a process that has been resorted to in several modern States—does not deprive it of whatever democratic character it possesses so far as the representatives of British India are concerned. It will also satisfy the conservatives and the vested interests, inasmuch as under the Act of 1935 Provincial Legislatures give adequate representation to minority communities and special interests. If the general elections of 1937 and the subsequent by-elections are taken as a guide there is every

reason to think that the major political parties in the country—the Congress and the League—will secure a fairly good proportion of representatives reflecting their relative strength in the electorate of the different provinces today. All the leading and most of the prominent members of the other parties will find a place on it.

#### DEFECTS

But this Constitution-making body suffers from many serious defects. It will not be a democratic body. For, under the Government of India Act of 1935 the franchise is based in the main on property qualifications and the total voting strength in all the provinces is about 30 millions which comes to about 14 per cent of the population of British India. The large masses of people will therefore have no hand in the selection of members to the Constitution-making body. Besides this the representatives coming from the States will mostly be the nominees of Indian rulers and however enlightened some of the rulers and their governments may be they are not believers in a responsible form of government. At the most they sympathize with what may be called a responsive system of government. The weightage possessed by communal and sectional interests will also be large. The Constitution framed by such a body will have little of democracy about it and will not be accepted as a permanent or final settlement of the constitutional problem. In consequence of this the revolutionary movement will receive additional momentum and grow in greater intensity. The attention of the new government will be absorbed in the mere preservation of peace and order and the real work which every modern government should undertake—the work of promoting the material and moral welfare of the people—will be indefinitely delayed.

Two modifications in this scheme are suggested by Pro-

fessor Coupland but they do not remedy the undemocratic nature of the body. One is that the number of members in it should be still further reduced. The other is that the representatives on the Constitution-making body should not be chosen by all the members of the provincial legislatures sitting together as one electoral college but by each legislature sitting separately. It is only then that the representatives will regard themselves primarily as delegates of their provinces rather than of British India as a whole. Such a procedure according to him would be more consistent with the conception of a federation and that was the procedure adopted in the United States, Canada, Australia and South Africa.

#### SAPRU COMMITTEE'S FORMULA

The modification suggested by the Sapru Conciliation Committee proceeds on the basis of parity between the Hindus other than Scheduled Castes on the one hand and Muslims on the other in the Constitution-making body in spite of the disparity in their population strength. In their opinion this course will promote communal unity. They also recommend this modification as the Declaration of Sir Stafford Cripps provides for election by a joint instead of a communal electorate and as joint electorates do away with most of the evils arising out of undue weightage given to the Muslim community. Thus modified the Constitution-making body will so far as British India is concerned consist of 160 members distributed as follows:—Special interests, viz. commerce and industry, landholders, universities, labour and women, 16; Hindus, excluding Scheduled castes 51; Muslims 51; Scheduled castes 20; Indian Christians 7; Sikhs 3; Backward areas and tribes 3; Anglo-Indians 2; Europeans 1 and others 1.



## PRINCIPLE OF PARITY

This question of parity between Caste Hindus and Muslims raises many issues of fundamental importance, which cannot be discussed in this place. To what extent it will really promote communal unity in the sense of the two communities working together whole-heartedly in the cause of Indian freedom is the point that requires consideration. Unity always implies some common external object or interest in the promotion of which the parties concerned actively co-operate with each other. Besides this it is necessary that we should have a complete grasp of all the consequences that arise out of the extension of the principle of parity to the legislatures, the executive, the administrative services and in course of time to all other spheres of public life. Such an extension is a part of the constitutional proposals of the Sapru Committee. It is sure to bring into existence a privileged caste of rulers and administrators and reduce to a considerable extent the opportunities for members belonging to the majority and other communities for improvement. Joint electorates only mitigate to a slight extent evils like these; and there cannot be a worse evil than denying to an individual equality of opportunity for no fault of his own. It is not justice to treat equals as unequals or unequals as equals; and the principle of parity between communities produces this kind of injustice to individuals. And after all justice and injustice have reference only to the lives of individuals and not to communities as such. All history has till recently — till the advent of democracy in the nineteenth century — been a record of minority rule and tyranny over majorities; and the principle of parity brings back and perpetuates this evil in an insidious manner. Unless we begin to look at problems from the point of view of individuals — for in the last analysis it is individuals that enjoy or suffer — and unless we recognize that com-

munities are merely instruments for the good of the individuals we will not be solving problems in the right manner. And the principle of parity gives no recognition to this. The utmost that may be said in its favour is that it is a necessary evil and that it has to be accepted today in order to avoid worse evils. It should not however be forgotten that a device which is inherently unjust may not be tolerated for a long time by the members of the majority community.

#### PARITY IN HISTORY

Let it also be noted that it is not for the first time in history that the framers of a constitution are confronted with the problem of the proper adjustment of relations between units which are unequal in size and numbers but which are anxious at the same time to federate themselves into a single State. The thirteen Commonwealths in the United States of America which entered into a federation in 1787 were of unequal size; the same was the case with the six Australian colonies which federated into a Commonwealth in 1900. The fear that the bigger units would dominate over the smaller ones marked the deliberations of the conventions that framed these federal constitutions but it was found that the fear was groundless. The observations of Hamilton in *The Federalist*—a book which ought to be studied by every Indian publicist today—on this subject of attempting to give equality of voting rights to units irrespective of their size deserve to be taken to heart by every person anxious to solve the Indian constitutional problem. He said: 'The right of equal suffrage among the States is another exceptionable part of the Confederation. Every idea of proportion and every rule of fair representation conspire to condemn a principle, which give to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut or New York; and to Delaware

an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal and that a majority of the votes of the States will be a majority of Confederated America. But this kind of logical legerdemain will never counteract the plain suggestion of justice and commonsense. It may happen that this majority of States is a small minority of the people of America; and two-thirds of the people of America could not long be persuaded, upon the credit of artificial distinctions and syllogistic subtleties, to submit their interests to the management and disposal of one-third.....' The debates of the convention clearly disclosed that the real answer to the anxieties which had burdened the hearts of the small State men was not equality of representation but the granting to the federal government clearly-stated and clearly-recognizable powers. All other suggestions like the partition of bigger States or the formation of several federations instead of only one were abandoned.

There is one other point arising out of the proposals of the Sapru Committee. In accepting that the members of the constitution-making body should be elected by the Provincial legislatures it has shown that it is not in favour of adult suffrage and therefore of giving a voice to all the people of the country in the shaping of the constitution. The Committee however has not given any reasons for its opposition to adult suffrage in this connexion. The position which it has assumed is inconsistent with its advocacy of adult suffrage for the Union Assembly to be brought into existence under the new constitution. If adult franchise is found to be a sound and workable proposition with reference to future legislatures there is no reason why it should

not be resorted to in elections to the constitution-making body.

#### GWYER'S FORMULA

The suggestion put forward in 1939 by Sir Maurice Gwyer in the address which he delivered to the Convocation of the Benares Hindu University has deservedly drawn the attention of the public partly because of his eminence as a jurist and partly because of some intrinsic merits of the constitution-making body recommended by him. After making a survey of the bodies that framed the constitutions of some of the modern States he came to the conclusion that it is only constitutions like those of Canada, Australia, South Africa and the United States which were hammered out by conventions of small size that are still in successful operation while those framed by a large Constituent Assembly like those of France in the revolutionary period and of Germany in 1848 and 1919 were very short-lived. The lesson therefore that should be learnt from these successes and failures is that the Constitution of India should be framed by a body small in size and not by a big Constituent Assembly as proposed by the Congress. It is not merely because of the teachings of history that he made this recommendation. It has according to him a few other merits also. It is easier to arrive at an agreed solution of constitutional problems in a small than in a big body. In a small body, 'men come to know each other better, to appreciate the strong points of another's case and to realize the weaker points of their own.....A sort of corporate sense is born, out of which there may emerge, if not a common will, at least a common desire to produce results.' Moreover, constitution-making is a laborious affair which requires infinite pains and patience if lasting results are to be achieved; and a small body is better fitted to carry out work of

this sort. There is also another merit that may be ascribed to a small body though it is not specifically mentioned by Sir Maurice Gwyer. It is this : In such a body deliberations can be carried on in secret and as the experience of the American, the South African and other Conventions has shown secrecy may be an essential requisite for the settlement of issues on which there are acute differences of opinion. And no one will deny that there are several such issues in India today.

#### SIZE NOT THE PRIMARY FACTOR

All these are weighty arguments in favour of a body of small size. But Sir Maurice Gwyer has not referred to the method by which the members of the body are to be chosen. The essence of the idea of a constituent assembly is not so much its large size — it may be big or small — but the popular source of its origin. Those who advocate it emphasize the need for having its members elected directly or indirectly by the people at large. As has already been pointed out the conventions which framed the constitutions of the United States, Canada, Australia and South Africa had a popular origin indirect in some cases and direct in others ; and the people at least in three cases, had a hand in ratifying the constitution so framed. Reference has already been made to the criticism directed in Canada against the constitution having been framed by the Premiers and their nominees without a popular mandate and to the failure of the first Australian Commonwealth Bill on that ground. That the actual work of constitution-making, even when a constituent assembly is convened, is left in the hands of small committees or even a few individuals should not be forgotten. Moreover every democratic organization today functions on the basis of parties. Elections are run by them and the members chosen to a constituent

assembly work under the direction and guidance of the party leaders. This is the device which democracy has adopted to minimize the defects arising out of legislatures which have necessarily to be of a large size if diverse interests and points of view are to be represented. A democratic assembly is not a mass meeting or the gathering of a mob or a crowd. It meets and carries on its deliberations in strict conformity with the various rules of procedure evolved out of experience. Decisions are arrived at as a result of mutual consultations among the leading men of different parties. There is also no reason to suppose that the success of the constitutions of the United States or of Canada is the result of their having been framed by small bodies or the failure of the constitutions of Germany the result of their having been framed by large bodies elected on a wide franchise. In all these cases there would not have been much difference whether it was a big or a small body that framed the constitution. For there is what Carl Becker called the intellectual climate of every age. Certain political ideas acquire dominance in each period of the world's history and no constitution-framer can escape from their influence. The doctrine of the Fundamental Rights of Man, of the separation of powers and of checks and balances, would have been written in any republican constitution of the eighteenth century whether it was the work of a small body or a big one. Today all our political ideas revolve around about half a dozen systems — democracy *versus* totalitarianism ; parliamentary, non-parliamentary and the Swiss forms of the executive with all their permutations and combinations ; territorial *versus* non-territorial forms of representation ; non-political statutory bodies to administer State enterprises, a non-partisan civil service and the rule of law. Every constitution-making body — whatever be its size — will have to make its choice from this limited field of ideas. The

framing of a constitution entirely new or original is neither possible nor desirable. A body of persons who have no faith in democracy are sure to produce a constitution different from that produced by those who have faith in it. But there will not be much difference in fundamentals between the democratic constitutions framed by bodies of different sizes if they consist of true democrats. All this of course does not rule out completely the case for a constituent assembly of small size. It is only intended to show that size is not a factor of primary importance. The really significant thing is the need of the constitution-making body deriving its authority from the people. And this is the main argument in favour of a constituent assembly elected by adult suffrage.

This is not the place to enquire into the causes of the failure of the constitutions framed by constituent assemblies in France or in Germany or for that matter in almost all the countries of Central and Eastern Europe in the period after the first World War. Such an enquiry will if it is to serve any useful purpose have to be a record of all those circumstances that have led to the collapse of democracy and the rise of dictatorship. But it is doubtful if among those causes and circumstances there will be room for including the large size of constitution-making bodies. Racial arrogance, European imperialism, the doctrine of unadulterated national sovereignty, and the giving up of all spiritual values—these have much more to do with the eclipse of democracy than perhaps the technical imperfections of the constitutions under which democratic States were governed.

#### OTHER SUGGESTIONS

It is not necessary to dwell at length on the suggestion of the late Sir Sikandar Hyat Khan, Premier of the Punjab, that a small representative body including the present and

past premiers of all the provinces should discuss the outlines of the future constitution. Such a body can never rise to the position of a constitution-making body in a democracy. Suggestions like these would not have been made if the distinction between exploratory work preliminary to constitution-making and the actual constitution-making had been kept in mind. Not that the distinction is unknown to the authors of these suggestions. Only they have not appreciated fully the value of the distinction. Reference to the need of representative Indians undertaking such exploratory work was made in the Viceroy's August (1940) offer and repeated by the present Viceroy in his letter to Mahatma Gandhi in August 1944 where he said: 'I see no reason why preliminary work on that constitution should not begin as soon as the Indian leaders are prepared to co-operate to that end.' A similar idea was given expression to a little later by Sir Maurice Gwyer. He observed: 'The time for anything in the nature of a constituent assembly is not yet, and even a constituent assembly would find it hard to produce results of value, unless there had first been a thorough exploration of the ground;' and he suggested the formation of committees for that purpose. At the same time he made it clear that such committees could be useful only in exploring the ground thoroughly while the actual constitution-making should be left in the hands of others. Such exploratory work has been going on in the country and it has resulted in the production of various constitutional schemes. A great service was done in this direction by the Sapru Conciliation Committee. There is unlimited scope for such work.



## 6. A CONSTITUENT ASSEMBLY FOR INDIA

### SELF-DETERMINATION DEMANDS IT

Now that all alternative methods suggested for framing the constitution for a Free India are found defective from some point of view or other it becomes clear that a Constituent Assembly elected by adult suffrage is the only body that is reasonably satisfactory for carrying out this work. It is the only machinery that is consistent with the principle of self-determination accepted today as much by the British as by the people of India, a principle according to which the Constitution should be framed by 'Indians for Indians, in accordance with Indian conceptions'. This implies that the work should be undertaken by all the Indians and not by any section or group among them. This is the strongest argument in favour of a Constituent Assembly and it was given expression to by Pandit Jawaharlal Nehru so early as 1934 when he said: 'Politically and nationally, if it is granted, as it must be, that the people of India are to be the sole arbiters of India's fate and must therefore have full freedom to draw up their constitution, it follows that this can only be done by means of a Constituent Assembly elected on the widest franchise. Those who believe in independence have no other choice. Even those who talk vaguely in terms of a nebulous Dominion Status must agree that the decision has to be made by the Indian people. How then is the decision to be made? Not by those self-constituted bodies called All-Parties Conferences which represent, if anybody at all, small interested groups and leave out the vast majority of the population. Not even, let us admit, by the National Congress, powerful and largely representative as it is... But the ultimate political decision must lie with the people of India acting through a popularly elected Constituent Assembly.'

## SETTLES MOST CONTROVERSIES

This is all the more necessary in view of the endless disputes that have been going on as to who represents whom? The claim of the Congress to represent all the Indians is vehemently disputed by the British and by almost all non-Congress parties in the country. Similarly the claim of the Muslim League to solely represent the Muslim masses is disputed by all the other parties. With reference to every community in the country there are rival organizations, each claiming to speak in the name of the community as a whole. It was for instance the claim of the British Government that the fifty seven members whom they invited to the Round Table Conference represented truly the four hundred millions of India while the Congress declared it to be a collection of hand-picked government men and that their voice was not the voice of the country. It has always been the contention of the British that the intelligentsia who are demanding freedom for the land do not represent the people. Such an opinion was held in 1888 by Lord Dufferin when he said: 'How could any reasonable man imagine that the British Government would be content to allow this microscopic minority (the Congress) to control the administration of that majestic and multi-form Empire for whose safety and welfare they are responsible in the eyes of God and before the face of civilization? It appears to me a groundless contention that it represents the people of India. Is it not evident that large sections of the community are already becoming alarmed at the thought of such self-constituted bodies interposing between themselves and the august impartiality of English rule?' About thirty years later the question 'What ratio of the people really asks for greater political power?' was raised by Messers Montagu and Chelmsford and they too had no hesitation in saying that the large

majority of the people do not ask for it. The Simon Commission as well as the Joint Parliamentary Committee of 1934-5 were also more or less of the same opinion although the inference they drew from it was not the one drawn in 1888 by Lord Dufferin. But even today the controversy is going on as to how far the politically conscious classes really represent the masses; and there does not seem to be any finality to it. A debate like this would not have mattered much if it had not interfered with the constitutional progress of the country. But in fact it has interfered. It has stood in the way of the country getting a free and democratic system of government. Some way therefore has to be found for settling the controversy and the only reasonable way is to consult the people and discover whether they have confidence in the leadership of the classes and of the several political organizations.

Just as the debate has been carried on between the British and the nationalists as to what extent the intellectuals represent the country, there has been a debate between the nationalists on one side, and the communalists and partitionists on the other as to how far the latter may be taken as correctly representing the point of view of the various communities — especially the so-called minority communities. The Muslim League is emphatic that the Muslim masses are solidly behind the Pakistan movement, while the nationalist Muslims and the Congress are equally emphatic in combating this view. Agreement among these leading political organizations has become an impossibility on account of this and there is a deadlock in the political situation. The only method by which this wordy warfare can be brought to an end and the political deadlock resolved is by an appeal to the members of the different communities and finding out their real wishes. Mahatma Gandhi has given expression to this aspect in the following words: 'The Constituent Assem-

bly provides the easiest method of arriving at a just solution of the communal problem. Today we are unable to say with mathematical precision who represents whom. Though the Congress is admittedly the oldest representative organization on the widest scale, it is open to political and semi-political organizations to question, as they do question, its overwhelmingly representative character. The Muslim League is undoubtedly the largest organization representative of Muslims, but several Muslim bodies—by no means all insignificant—deny its claim to represent them. But the Constituent Assembly will represent all communities in their exact proportion. Except it, there is no way of doing full justice to rival claims. Without it, there can be no finality to communal and other claims.'

#### ADULT SUFFRAGE

If a constituent assembly is to truly represent the people and serve the purpose which it is intended to serve—especially as a solvent of all doubts regarding representation—it must be elected by adult suffrage. Any restriction of the right of voting to limited sections of the people on the basis of literacy or tax-paying capacity or property will only reveal the opinion of the few and a constitution framed under such circumstances cannot claim to be a national instrument. Moreover, it should be noted that the system of adult suffrage which is now so vehemently opposed by Mr Jinnah and his school of political thought was originally put forward by the Congress primarily with the object of satisfying Muslim public opinion. Dr Pattabhi Sitharamayya, the historian of the Congress says: 'It is to meet Muslim wishes and safe-guard their interests that adult franchise is adopted, for, either literacy or property qualification is bound to put them at a disadvantage. They have all along asked for adult franchise or a franchise that would

make the strength of their voters bear to the voters of the Hindu community the same proportion as their population bears to the Hindu population. Such a franchise should be by weightage or handicap and cannot be democratic. If after such an arrangement the minority does not want swaraj, the world will know where we are. If it does want we shall know their conditions. This is the philosophy of the constituent assembly and of the settlement of the communal question as part of it or as ancillary to it.'

#### OTHER ADVANTAGES

Two other advantages have been legitimately claimed for the constituent assembly as the proper machinery for framing the future constitution of a free India. Prominent Indian leaders like Pandit Jawaharlal Nehru have always felt that political freedom is not an end in itself but an essential means for promoting the economic and the social welfare of the masses who have for ages been under the grip of the propertied and the privileged few. The communal problem in India today is to a great extent the artificial creation of the middle class intellectuals fighting for political jobs. The real problem—the problem as it affects 99 per cent of the members in every community—is a socio-economic one and it ought to be the aim of any constitution-making body to give emphasis to this aspect. Even Sir Maurice Gwyer who is opposed to the whole idea of a constituent assembly has laid stress on the importance of the social-economic problem in India today; and according to him it is exceedingly more important than even the Pakistan issue which is looming so large in current politics. The question therefore is—what constituent body will give to India a really twentieth century constitution? A constituent assembly which is dominated by the representatives elected by the masses will be best fitted

to evolve such a constitution. As Pandit Jawaharlal Nehru puts it: "The so-called communal problem will fade into the background, for the masses will be far more interested in filling their hungry stomachs than in questions of percentages. This assembly will release the vital forces in the country which are at present suppressed by our foreign rulers as well as by Indian vested interests."

The other advantage arising out of the organization of a constituent assembly is that the propaganda carried on in its favour, the elections held for it and the interest that is created in it will all be an effective method of educating the public in the politics of the country. The so-called inertia of the masses will be dispelled. It means, according to Pandit Nehru, a nation on the move, the masses of the country in action through their elected representatives. In the words of Mahatma Gandhi it will be a vehicle for mass political and other education.

It has already been pointed out that this method of framing a new constitution for a liberated country has the support of history behind it and that it is the only method under which the representatives of the elements in India's national life — the elements whose agreement is necessary according to the Viceroy's August offer for the constitution to be framed — will have an opportunity of shaping the governmental system under which they desire to live.

#### OBJECTIONS CONSIDERED

The method of having the constitution of a free and democratic India being framed through a constituent assembly has been objected to on several grounds. It is contended by some that the masses of people in the country consist of illiterate and therefore ignorant villagers, that they are priest- and caste-ridden, that they are ignorant of even the ordinary political issues and it would be a most

ill-conceived and even harmful method to entrust them with the work of constitution-making. The representatives chosen by them will also be mostly illiterate and quite unfit to deal with problems of constitutional reconstruction.

This is however an old objection to which answers have been given on various occasions by the advocates of universal franchise in India and elsewhere. There is really no connexion between literacy as such and the capacity to choose proper representatives. Among those enfranchised today on grounds of property there are many illiterate voters. Moreover, it is not now for the first time that elections are being introduced into the country. People have been familiar with them in some form or other for nearly fifty years. In addition to this there has been since the assumption of political leadership by Mahatma Gandhi a real awakening among the masses and they have become accustomed to start and work voluntary associations of all sorts based on elections and voting. We have therefore to revise our ideas about the capacity of the people to choose the right sort of representatives—especially the capacity of the people of the British Indian provinces and those Indian States where representative legislatures, village panchayats, co-operative societies, and other elected institutions have been working for some time. The coloured box has already been devised to enable illiterate voters to record their votes. And as Mahatma Gandhi has observed what is required is not necessarily a wise but a representative decision.

#### SAFE-GUARDING MINORITY INTERESTS

The next objection to the method of constituent assembly is that most of the seats on it will be captured by the Hindu majority community and that minority interests will not be adequately represented. This objection has already been considered by the advocates of a constituent assembly

and they have modified their original proposals in the light of this criticism. As Pandit Nehru puts it : ' In order to remove all suspicion from the minds of a minority, it may even, if it so chooses, have its representatives elected by separate electorates.' It has also been accepted that matters solely affecting a particular minority should be decided only by its representatives in the assembly and that issues which affect the minority as well as the rest of the population in regard to which agreement is not possible should be referred to arbitration. These suggestions and modifications weaken the force of the objection that minority interests would not be properly safe-guarded in a constituent assembly.

Another objection is that a constituent assembly elected by adult suffrage will be unwieldy in size if the country is divided not into huge constituencies but into manageable ones. There is however no need to make it too big. If a system of indirect election is adopted — and there is nothing undemocratic about it — an assembly of say about 400 members can be established. Even if it is a little bigger than this, one need not be alarmed as it has already been shown in examining the proposals of Sir Maurice Gwyer that with proper organization and procedure a big assembly can be made to function effectively.

It is the contention of certain critics — and Sir Maurice Gwyer may be taken as a type of them — that though it is of the essence of a democratic constitution that ultimately and after full discussion and deliberation, the popular will shall prevail and though no more effective political expedient has yet been discovered to achieve this result than that of counting votes, it remains a political expedient and is not to be elevated into a moral principle and that where the minorities are not prepared to resort to this expedient it is best to give it up and have in its place some other method which even though less democratic has behind it the



agreement of all the parties concerned. But all this begs the whole question. Will a body not resting on popular choice frame a democratic constitution? And Sir Maurice Gwyer says that he is not concerned with any other kind of constitution. Secondly, what the advocates of a constituent assembly assert is that whether several communities are or are not agreed on having the future constitution of India framed by such a body is a point which has to be decided not by a few leaders however personally eminent they may be but by the communities themselves. The communities should first choose their representatives to such an assembly; and if in that body the representatives prefer to have the constitution made in some other way it is only then that the alternative methods should be resorted to. Thus, in any case, there is a stage at which a constituent assembly has to be convened.

There are some other critics who think that the influence of the Indian National Congress is so great today and that the canvassing power of the network of its organizations is so unequalled that in any election that may be held on the basis of adult franchise it would obtain a clear majority in the constituent assembly, become by far the strongest party in it and the new constitution would consequently be framed in accordance with 'Congress Principles'. It is not clear why any objection should be taken to a result like this although it is doubtful whether that will be an inevitable result. The purpose of an election is to discover which party and which policy are favoured most by the electorate. Moreover what after all are the 'Congress Principles'? Are they inconsistent with the existence of a free and democratic India? Congress has no rigid views on the system of government to be established in the country. Its views are flexible and have undergone great changes in consequence of the need it felt for adjusting its policies and

objectives to those of the other political organizations in the country. It has abandoned unitarism and taken to federalism; it has given up the location of residuary power in the centre and is prepared to locate it in the units. There have been many other modifications of this sort. No one therefore need be frightened if a system of government is framed in accordance with the flexible principles of the Congress.

#### TROUBLE AND EXPENSE

It is argued by some others that anyhow even in a constituent assembly it is the opinion more of the leaders of different communities and political organizations than of the followers that will count and it is through a process of give and take among such leaders that the constitution will be finally framed and therefore all the trouble and expense involved in preparing registers of voters, arranging for elections, and facing all the excitement associated with elections—all these can be avoided if constitution-making is left from the beginning in the hands of leaders. The outcome of such a course, they argue, will not be very much different from the work of a constituent assembly but will be secured with less trouble and at less cost. There is not however much force in this argument. In the first place most of the present leaders are self-elected ones and no one can assert how far they really represent the communities or interests they claim to represent; and there are also rival leaders, speaking on behalf of the same interest or community. Moreover it is because all efforts that have so far been made to bring about agreement among leaders have failed that the need has arisen of making an appeal to the people themselves. Elections to the constituent assembly will show who the real leaders are and what policies they are called on to uphold. Herein lies the superiority of the

method of constituent assembly over that of a conference of leaders.

It is not proposed to consider here the objections raised by those who have no faith in democracy or who believe that it has no chance of success in India today. It is only when we start on the assumption that a government resting on popular choice and responsible to the people has a fair prospect of being successfully worked in India that the doctrine of constituent assembly becomes valid. For it is essentially a democratic doctrine and stands or falls with the theoretical and practical validity of this doctrine. The British government is a believer in democracy. The opposition to democracy which characterizes Mr Jinnah and the Muslim League is due to their sponsoring the two-nation theory. For each nation separately they think that democracy is an appropriate form of government and if they are persuaded to abandon their theory they too may be expected to work for a democratic system of government. Opposition to democracy characterizes the attitude of most Indian rulers. It is natural. But the time has come when they should give up their attachment to autocracy and be content to play the role of constitutional monarchs—a role with which their present suzerain, the British monarch is perfectly satisfied. The world has been marching in the direction of democracy. It is true that the march has not been smooth or easy or continuous ; but all the same most of those who believe in human progress are holding steadfastly to this system of government. India is as much in need of it as any other country ; for it is realized that it is the only perfect instrument for bringing about the salvation of the common man.

#### A SCHEME IN OUTLINE

Space does not permit any detailed account being given

of the method of election to the constituent assembly, its strength, organization and procedure and the fundamental problems it will be called upon to solve. Experience is the only guide in all these matters and an analysis of that experience has been already given in the earlier chapters. All that is possible here is to indicate the broad outlines of the subject.

### STRENGTH

The strength of the constituent assembly may be fixed at four hundred. Such a number will adequately serve the purpose of giving representation to the diversity of views which are of any significance. This will work at the rate of one member per million inhabitants.

It is best that the members are elected indirectly. Direct election would mean huge constituencies with all the incidental complications. Indirect election is quite as democratic as direct election.

### INDIRECTLY ELECTED

In determining the nature of the body that should serve as a sort of electoral college for electing the members of the Assembly the significance of the village and the Village Panchayat should be kept in mind. The village is the most ancient territorial unit in the country; and it has continued to exist down through all the ages of her history. It is the one unit the inhabitants of which maintain a corporate spirit. Unlike the Taluk, the District and the Province it is a natural and not an artificial unit modified from time to time according to political and administrative exigencies.

The characteristic institution of the village is the Panchayat. Its nature and characteristics are fully understood by the people. 'Panchayat' is a name to conjure with in every part of the country.

## THROUGH PANCHAYATS

Each village should be called upon to elect a Panchayat the strength of which will necessarily vary with the population of the village. For every hundred people residing in the village one member should be allotted, so that if a village consists of a population of five hundred it will elect a Panchayat of five, and if the population is one thousand it will elect a Panchayat of ten.

If as seems probable separate electorates have to be accepted the same principle of Panchayat may be followed in the case of these electorates also. Every recognized minority will elect Panchayats on the basis of one member per hundred population. Each area containing a population of five hundred belonging to any one of these communities may be formed into one constituency and it may be called upon to elect a Panchayat of five.

There is no need for the representation of interests like labour, landlords and commerce. Persons belonging to these groups are sure to come into the Panchayats either through the general or the communal electorates, partly because of their large numbers in some cases and partly because of their influence and capacity for leadership in others.

As the population of the country is about four hundred million the total number of members in all the Panchayats will be four million. And it is these four million Panchayatdars that will elect the members of the Constituent Assembly. They will be grouped into four hundred constituencies each consisting of ten thousand Panchayatdars and each constituency will elect one member of the Assembly. As the division into general and communal electorates will be carried into this stage the Constituent Assembly will have members belonging to all recognized minority communities in proportion to their population strength. 'Recognized communities' in this connexion should mean

the Muslims, the Scheduled Classes, the Indian Christians, the Sikhs, and the Anglo-Indians. No other communities should be included in this category.

#### PROCEDURE

The Constituent Assembly thus formed will elect its President and panel of chairmen. It will also have to elect its executive corresponding to the Cabinet found in every country with a democratic form of government. The executive will consist of the Leader of the House who will be more or less like the Prime Minister in a Cabinet and of the other prominent leaders in the Assembly. It will be the task of this executive to draw up preliminary resolutions for being introduced into the Assembly. It will take the initiative in settling the procedure to be adopted and the committees to be formed. It will also guide in a general way all the deliberations of the Assembly. Much of the success of the Assembly will depend on the character of the Leader and his Cabinet.

Some of the deliberations of the Assembly and almost all the deliberations of Committees will have to be carried on in secret. The Assembly and the concerned Committees should have full freedom to determine whether their proceedings should be or should not be open to the public. Their discretion in this respect should not in any way be fettered.

#### DECISION BY MAJORITY VOTE

All questions coming before the Assembly should be settled by an ordinary majority vote. The exceptions to this will be those matters which relate to the rights and privileges of particular communities and in this their voice should be final. Issues in regard to which there is a difference of opinion as to whether they affect only particular communities

or the people as a whole should be decided by a special majority — say two-thirds of those present and voting. Unanimity should not at all be adopted as a rule with reference to any matter however important it may appear to be. It was not done in the Federal Convention of the United States. Even in South Africa where there were acute differences between colony and colony and where the colonies were not represented in the Convention by equal number of delegates unanimity was not insisted upon. That all members in their individual capacity or that all communities (or elements in the national life) in their collective capacity should give their unanimous consent to every resolution before it becomes a decision of the Assembly is to make the framing of the Constitution an impossible task. Minorities have their rights and so also majorities; and among the rights that may be justifiably claimed there is no place for the right to hold up constitutional reconstruction for all time. When it is perceived that the decision of a group of delegates belonging to any community is arrived at on the basis of majority vote and not of unanimity it is the height of inconsistency to insist on such a rule with reference to the discussions in the Assembly as a whole. The procedure that is considered just and workable in one case should be given validity in the other case.

#### NOT UNANIMITY

The contention that unless there is unanimity or agreement among all the elements in India's national life to any constitution that is framed such a constitution will not be acceptable to the British is one which all experience of history proves to be a contention that will only create deadlocks or civil wars. One is reminded in this connexion of the stand taken by the famous American statesman Calhoun who argued — as the communalists in India argue

today—that there was not at the time of his writing, nor had there ever been, any such political body as the American people, that as one people they never performed a single political act and that the American Union (even after eighty years of its continued existence) was a union of States as communities and not a union of individuals. And from this position he evolved the doctrine of concurrent majority as distinguished from numerical majority, a doctrine according to which every State has a right to veto and nullify the decisions of the Union if such a decision went against its interests. It was the insistence on this doctrine that led to the secession movement and the great Civil War in America. It should also be noted that agreement by itself has no validity unless the principle or the system agreed to is based on justice. An agreement among thieves does not make their action justifiable. To exalt therefore the canon of unanimous agreement to the highest plane in social life is to undermine its foundations.

So much for the mode of voting in the Constituent Assembly.

#### WORK OF THE ASSEMBLY—TREATY

The framing of a Constitution for the country is the work that has to be accomplished by the Assembly. But in order to carry this out it will have to settle earlier one outstanding issue and perhaps even two such issues. The main issue is the conclusion of a Treaty with Britain. The nature and scope of the Constitution which it frames, the transitional and the permanent clauses that should be included in it will depend to a considerable extent on the kind of treaty entered into. And the conclusion of the treaty calls for virtues of high statesmanship, foresight, shrewdness, courage and diplomatic skill of a high order. In all the official pronouncements made by the British for



the transfer of power into Indian hands it has been laid down as a condition that agreement should be reached not only by Indians among themselves as to the kind of constitution, but also by Indian constitution-makers with the British authorities as to the way in which the government of free India would discharge certain responsibilities which were hitherto vested in the British Government. These responsibilities are those which Great Britain's long connexion with India has imposed on her. They relate to defence, to the protection of the Indian Princes and the safe-guarding of the interests of racial and religious minorities in the country. India is according to the British not in a position to defend herself today if the British forces are withdrawn; nor will she attain to that position for a long time to come. As Mr Amery puts it: 'So long as the defence of India requires the permanent presence—as distinguished from help in a great emergency—of British forces it is obvious that Government which provides those forces is entitled to retain a measure of control over their employment *in peace* as well as over the *external policy* which may call for their employment *in war*.' A treaty is necessary for this purpose. The British have given pledges to protect the Indian Princes and they should therefore be satisfied that the new government of India does nothing to interfere with the rights and prerogatives of the Princes. The Treaty between the Constituent Assembly and Britain should make provision for this also. That racial and religious minorities will be tyrannized by the majority is another fear entertained by the British although when so many communities are regarded as minority communities and the Hindu majority community is regarded as having been always divided into numerous castes and sub-castes rigidly separated from each other it is rather doubtful if there is really any community entitled to be called a majority community with opportunities to

oppress the minorities. All the same the British want that the treaty should provide for proper safe-guards to minority interests. It is only on the basis of a Treaty providing for all these matters that the Assembly should proceed to frame the Constitution.

#### IMPERIALISM AND MARXISM

A good deal of care and caution is necessary in negotiating the terms of such a treaty with Britain. For, the school of political thought in England which is dominant in the sense that it alone controls the policy of the government towards India and the Colonial dependencies constituting the Empire as distinguished from the Commonwealth is still the die-hard imperialistic school. And there is a close similarity between the imperialism represented by this school and Marxism so far as the politics of power is concerned. If their view is to prevail India will have to be kept in perpetual wardship in respect of the responsibilities and obligations referred to above. According to this school of imperialism, conflict between diverse races, creeds and communities is the keynote to the history of India. They attach the same significance to this as the Marxists attach to class conflict in the march of history. Just as the Marxists believe that a period of proletarian dictatorship or of the rule of the Communist Party is absolutely necessary before class conflict is put an end to and the classless society is created, the Imperialists also believe that imperial rule is necessary if India is to be saved from communal conflict and real unity is to be ultimately achieved. Imperialism will have fulfilled its mission when all rivalry between community and community disappears, when the backward communities are raised to the level of the progressive ones and when perfect peace and harmony will come to prevail among them all. Imperialism will then 'wither away' automatically just as

the Marxists argue that the State with its proletarian dictatorship will wither away when the class conflict disappears and classless society emerges. Both schools are also similar in thinking that it is impossible to predict when such a consummation will be achieved. It may take decades or hundreds of years and during all this period of *transition* the Imperial rule in one case and the Communist rule in the other should continue. The liquidation of the Empire is only a distant contingency though it is inevitable in the long run.

The Constituent Assembly should keep itself awake and not be caught by ingenious doctrines of this character. It has to see that the Treaty it concludes with Britain does not lead to the perpetuation of British control in some new form for an indefinite period of time.

#### A UNITED OR A DIVIDED INDIA ?

The second issue with which the Assembly may be confronted is whether it has to frame a Constitution for a United India or for an India partitioned into a Hindustan, a Pakistan and other 'Stans'. This is not the place to discuss the merits and defects of the several schemes of partition or the formation of several Unions in the country as proposed by Sir Stafford Cripps. This subject is referred to only to show that the kind of constitution to be framed will vary in several particulars according as it is framed for India as one single political entity or for India dismembered into numerous sovereign States. If partition is decided upon there will be no place in the Assembly for those who propose to cut themselves away from the country.

In actually framing the Constitution the Assembly will have to settle many vital questions. The incorporation of Fundamental Rights, the distribution of powers between the Centre and the parts, the structure of the Central Legislature,

Executive and Judiciary, the system of Finance, the nature of Franchise and electoral organization, and a host of other matters will have to be decided. The task however may not be as difficult as some alarmists think it to be. We have numerous models of modern constitutions to guide us. The Assembly will also be called upon to settle the Constitution of the Units in broad outline so that there may be harmony between the principles on which the Central government and the governments of the units are based. The power of subsequent amendment to their constitutions is to be left to the Units themselves.

This in brief is the kind of work that the Assembly will have to accomplish.

#### TRANSITION THROUGH NEGOTIATION

The argument of this and the preceding chapter has proceeded on the assumption that the reasonableness of this method of framing the future Constitution of the country would be appreciated by all the parties concerned—the British, the Minorities and the Majority—and that they would generally agree to co-operate in the framing of a Constitution by such a body. A peaceful transition from the existing regime to the new regime is what has been contemplated.

#### THROUGH CONQUEST OF POWER

But other situations and other problems will arise if the parties that stand for freedom and democracy and demand a Constituent Assembly are not able to get their demand conceded through negotiation. These parties will then have to acquire sufficient strength and conquer power though in the peculiar circumstances of the country it will be a conquest through the use of the new technique of non-violence. The need for resorting to such tactics shows that the time

is not yet ripe for a Constituent Assembly to come into existence and that the political problem whose solution should always precede the solution of the constitutional problem is still there. In such a situation the attention of the country will be naturally directed to the solution of the political problem and to the creation of the conditions under which alone a Constituent Assembly can meet and carry out its work.

To the question therefore whether the time is come for framing the constitution of the country through a Constituent Assembly no definite answer can be given. If reason prevails the answer will be 'Yes'; but if passions prevail the answer will be 'Not yet'. But when the time comes and when a really democratic constitution has to be framed the Constituent Assembly is the proper and correct machinery for doing it.

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